In The

Supreme Court of the United States

October Term, 1970

No. ~~1480~~ 70-98

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

RUDOLPH SANTOBELLO,

Petitioner.

On Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department.

Petition for Certiorari filed March 18, 1971

Certiorari granted May 29, 1971

APPENDIX

IRVING ANOLIK
Attorney for Petitioner
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Indictment

SUPREME COURT
IN AND FOR THE COUNTY OF BRONX

[TITLE OMITTED IN PRINTING]

The Grand Jury of the County of Bronx, by this indictment accuse defendant, Rudolph Santobello of the CRIME OF PROMOTING GAMBLING IN THE FIRST DEGREE, committed as follows:

The said defendant, in the County of Bronx, on or about the 13th day of November, 1968, did knowingly advance and profit from unlawful gambling activity by receiving, in connection with a lottery and policy scheme and enterprise, written records from a person other than a player whose chances and plays were represented by such records.

SECOND COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendant, of the crime of POSSESSION OF GAMBLING RECORDS IN THE FIRST DEGREE, committed as follows:

The said defendant, in the County of Bronx, on or about the 13th day of November, 1968, did possess, with knowledge of the contents thereof, writings, papers, instruments and articles of a kind commonly used in the operation, promotion and playing of a lottery, and policy scheme, and enterprise, and constituting, reflecting and rep-

resenting more than five hundred plays and chances therein.

BURTON B. ROBERTS,

District Attorney

Judgment of Conviction

At a term of the Supreme Court of Bronx County, held in and for the County of Bronx, in the Court House in the Borough of Bronx, City of New York, on the 9th day of January, in the year of our Lord one thousand nine hundred and 70.

P R E S E N T:

Hon. ABRAHAM J. GELLINOFF

J.S.C.

Judgment of Conviction

THE PEOPLE OF THE STATE OF NEW YORK

-against-

RUDOLPH SANTOBELLO

Indicted for Promoting Gambling 1st Deg. and convicted of Possession of Gambling Records (Misd.) upon his own confession and plea of Guilty.

WHEREUPON it is Ordered and Adjudged by the Court, that the said Deft. for this Misdemeanor aforesaid whereof he is convicted, be imprisoned in the New York City Correctional Institution for Men for (1) one year.

A true extract from the minutes.

LEO LEVY
Clerk

Motion Withdrawing the Plea of Guilty

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Rudolph Santobello, sworn to the 23rd day of September, 1969, and the affirmation of Joseph Aronstein, dated September 23, 1969 and upon all the proceedings heretofore had herein, the undersigned will move this Honorable Court, on the ____ day of _____, 1969, at ten oclock in the forenoon of that day, or as soon thereafter as counsel can be heard, at the Court House, 161 Street and Grand Concourse, County of Bronx, City and State of New York, for an Order, withdrawing the plea of guilty heretofore entered by the above named defendant upon the grounds set forth in the attached affidavits and for such other and further relief as may be just and proper.

Dated, New York, N.Y.

September 23, 1969

Yours, etc.,

JOSEPH ARONSTEIN
Attorney for Defendant
Office & P.O. Address
1650 Broadway
New York, N.Y. 10019
Telephone Pl. 7-8671

Motion Withdrawing the Plea of Guilty.

To:

CLERK OF COURT;

Hon. BURTON D. ROBERTS,
District Attorney,
Bronx Conty

Affidavit of Rudolph Santobello Sworn to September 23, 1969, in Support of Motion Withdrawing the Plea of Guilty

SUPEME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

[TITLE OMITTED IN PRINTING]

STATE OF NEW YORK)

COUNTY OF BRONX) ss.

Rudolph Santobello, being duly sworn, deposes and says that he is the above named defendant and that he was arrested on or about November 13, 1968 in the County of Bronx by a person he now knows to be Police Officer Serpico and subsequently indicted by the Grand Jury of Bronx County upon two counts charging violations of the gambling statutes of the State of New York.

Deponent states that he subsequently pleaded guilty to a misdemeanor upon a gambling charge and is now awaiting sentence.

Affidavit of Rudolph Santobello Sworn to September 23, 1969, in Support of Motion Withdrawing the Plea of Guilty.

Deponent states that the time he pleaded guilty the Court failed to inform deponent of the law with respect to the charges contained in the indictment and failed to explain to deponent that under the law the People were required to prove that the writings purported to be policy records were received by him from a person other than a player,

Deponent states that at the time he pleaded guilty the Court failed to inform deponent of the law and, that under the second count of the Indictment, charging possession of gambling records, to wit, writings constituting and representing more than five hundred plays and chances in the playing of policy, and that by his plea of guilty he was surrendering all of his constitutional rights.

Deponent states that he has been informed by his attorney, Joseph Aronstein, that the search and seizure made by Police Officer Serpico was made without a search warrant and in violation of his rights under the Fourth and Fifth Amendments through the Fourteenth Amendment of the Constitution of the United States and that a motion should be made to suppress any evidence obtained by the police in violation of his constitutional rights, and that before and at the time a plea of guilty was entered deponent did not know that he had the right to move to suppress any evidence secured by the police as aforesaid.

Deponent further states that he has been informed by his attorney that from a reading of the Information sworn to by the police officer, Ser-

pico, in the Criminal Court, that a motion should be made to inspect the minutes of the Grand Jury upon the ground that the evidence adduced before the Grand Jury was insufficient as a matter of law to support the indictment.

Wherefore deponent respectfully prays that this Court make an Order, vacating and setting aside the plea of guilty heretofore entered and for leave to make any and all necessary motions and for such other and further relief as may be just and proper for which no previous application for the relief herein prayed for has heretofore been made.

[Duly sworn to on September 23, 1969]

Rudolph Santobello

Affirmation of Joseph Aronstein Dated September 23, 1969, in Support of Motion Withdrawing the Plea of Guilty.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

[TITLE OMITTED IN PRINTING]

Joseph Aronstein, attorney at law, does hereby affirm under the penalties of perjury pursuant to the provisions of Section R2106, C.P.L.R. that he is the attorney for the above named defendant.

Affirmation of Joseph Aronstein Dated September 23, 1969, in Support of Motion Withdrawing the Plea of Guilty.

Deponent states that he has informed the defendant that before the Court accepted his plea of guilty the Court was under a duty to explain to him all of the elements of the crime charged in the indictment and to inquire whether the defendant understood the nature of the charge as contained in the indictment and inquire from the defendant precisely what acts were committed by the defendant so that the Court can determine whether in fact the acts admitted to have been committed by the defendant constitutes the charges contained in the indictment.

Deponent has further informed the defendant that it was the duty of the Court to inquire from the defendant whether, as charged in the indictment, count 1, he received from a person other than a player the written records alleged to have been found in his possession used in connection with a lottery and policy scheme.

Deponent has also informed the defendant, that from the sworn allegations of the police officer, Serpico, the search and seizure made by said police officer were illegal having been made without a search warrant in violation of his rights under the Fourth and Fifth Amendments through the Fourteenth Amendment of the Constitution of the United States, and that further, the search made by the police officer of the automobile was also illegal for the same reasons.

Affirmation of Joseph Aronstein Dated September 23, 1969, in Support of Motion Withdrawing the Plea of Guilty

Deponent has informed the defendant that the evidence before the Grand Jury must be insufficient to sustain the allegations of the indictment and that this is based upon the sworn allegations contained in the Information filed by the police officer in the Criminal Court in that such information does not state that the policy writings received by him were received by a person other than a player, and further, that the second count of the indictment is duplicitious and void in that such count charges the same crime as is alleged in the first count of the indictment, and that therefore, a motion must be made to inspect the minutes of the Grand Jury that returned the indictment against him, or in the alternative for an Order to dismiss said indictment.

Dated, New York, N.Y.

September 23, 1969

Joseph Aronstein.

Notice of Motion to Suppress Evidence

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

[TITLE OMITTED IN PRINTING]

SIRS:

Notice of Motion to Suppress Evidence

PLEASE TAKE NOTICE, that upon the annexed affidavit of Rudolph Santobello, sworn to the 23rd day of September, 1969, and upon all the proceedings heretofore had herein, the undersigned will move this Honorable Court for an Order, suppressing the evidence secured by the police of the City of New York upon the ground that such evidence was obtained in violation of the rights of the defendant under the Fourth and Fifth Amendments of the Constitution through the Fourteenth Amendment thereof without a search warrant, and for such other and further relief as may be just and proper, on the _____ day of September, 1969, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, at the Court House, 161st and Grand Concourse, County of Bronx, City and State of New York, and for such other and further relief as may be just and proper.

Dated, New York, N.Y.

September 23, 1969

Yours, etc.,

JOSEPH ARONSTEIN
Attorney for Defendant
Office & P.O. Address
1650 Broadway
New York, N.Y. 10019
Telephone: Pl. 7-8671

TO:

Notice of Motion to Supress Evidence

CLERK OF COURT;

Hon. BURTON D. ROBERTS,
District Attorney
Bronx County

Affidavit of Rudolph Santobello Sworn to September 23, 1969, in Support of Motion to Suppress Evidence.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

[TITLE OMITTED IN PRINTING]

STATE OF NEW YORK)
) ss.
COUNTY OF BRONX)

Rudolph Santobello, being duly sworn, deposes and says; that he is the above named defendant and that he was arrested on November 13, 1968 by a person he now knows to be Police Officer Serpico after he had entered an automobile that was parked at Brook and Bergen Avenues, County of Bronx.

Deponent states that he has read the sworn Information made by Officer Serpico and knows that Officer Serpico, without a search warrant, removed from a compartment in a wall a paper containing what the police officer states is policy writings and that said police officer after placing his initials upon said paper returned the paper to the aforesaid compartment.

Affidavit of Rudolph Santobello Sworn to September 23, 1969, in Support of Motion to Suppress Evidence.

Deponent thereafter removed from said compartment the slip of paper and placed it in his pocket and went to the aforesaid automobile when Officer Serpico arrested him and searched his person and that deponent demanded to know whether Officer Serpico had a search warrant for his person or a search warrant to search the premises and that Officer Serpico told him that he did not need a search warrant.

Deponent states that when the paper was placed in the compartment said paper was not abandoned and that the police officer did not have any right to search said compartment and remove the paper without a warrant to search for and seize the paper and a warrant particularly describing the property to be searched for and seized and that the search and seizure was illegal and in violation of his rights under the Fourth and Fifth Amendments through the Fourteenth Amendment of the Constitution of the United States.

Wherefore deponent respectfully prays that this Court make an Order suppressing any evidence secured by the illegal search made by Officer Serpico in violation of his rights under the Fourth and Fifth Amendments through the Fourteenth Amendment of the Constitution of the United States and for such other and further relief as may be just and proper for which no previous application for the relief herein prayed for has heretofore been made.

[Duly sworn to September 23, 1969]

s/ Rudolph Santobello

Affidavit of Patrolman Serpico

CRIMINAL COURT OF THE CITY OF NEW YORK
PART 1A 2, COUNTY OF BRONX

STATE OF NEW YORK)
COUNTY OF BRONX) ss.:

PTL F. SERPICO, 19076 of No. 7th Div being duly sworn, says that on November 13, 1968 about 1:10 p.m. at Intersection Brook & Bergen Aves., Bronx County, City and State of New York, the defendant Rudolph Santobello did commit the offense of PL 225.10 Promoting Gambling, 225.20 Possession Gambling Records, in that:

Deponent had said location under observation from 12:30 pm to 1:10 pm, during which time he did observe an unknown male secrete a slip of white paper in wall of said location and then leave. Officer approached said location, removed said slip of paper from wall, examined same, and found it to contain notations representing numerous plays MRHP. Officer initialed same and returned it to wall. At approx. 1:10 pm deponent observed defendant approach said wall, remove said slip of paper, examine it briefly, and place it in his right coat pocket, and then enter an auto registration no. XD2979. Officer approached, identified himself to defendant, and placed him under arrest. From the defendant's possession officer removed a slip of paper bearing officer's initials and approximately 140 plays MRHP with amts. wagered. From the def's possession officer also removed a plastic card case containing three slips of paper bearing approx. 700 plays MRHP and 9 slips representing controller's records from visor of said

car. Officer also removed a white envelope bearing notations representing controller's records. Officer also removed from deponent 636 dollars USC which was counted and returned to defendant.

s/ F. Serpico
Affiant

[Duly sworn November 13, 1968]

Louis A. Cioffi
Judge

Affirmation of Seymour Rotker Dated October 3, 1969, in Opposition

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

[TITLE OMITTED IN PRINTING]

SEYMOUR ROTKER, under the penalties of perjury and pursuant to Rule 2106 C.P.L.R., affirms and says:

I am an Assistant District Attorney in the office of the District Attorney of Bronx County, and am fully familiar with all the facts and circumstances herein.

The defendant was indicted on December 9, 1968 and charged in a two-count indictment with Promoting Gambling in the First Degree and pos-

Affirmation of Seymour Rotker Dated October 3, 1969, in Opposition

session of Gambling Records in the First Degree.

On June 16, 1969 he withdrew his plea of not guilty before the Honorable Justice Marks and pleads to the misdemeanor of Possession of Gambling Records in the Second Degree. Thereafter the matter was on for sentence June 30th, September 16th and September 23rd, 1969. Defendant at this posture now seeks permission to withdraw his plea of guilty previously entered. The matter has been set down for October 8, 1969 for determination whether or not defendant will be permitted to withdraw his plea.

The People strenuously oppose defendant's application, as he sets forth no reason or any change of circumstances from the time the plea was entered until the time the motion was made asking leave to withdraw his plea. Furthermore, in order to determine the factual issues in question as it pertains to this matter, the People respectfully request the matter be set down for a hearing.

WHEREFORE, the People pray the defendant's motion be in all respects denied, and in the alternative, if the Court feels there is any justification to grant the motion, the People request a hearing to determine the issues as it pertains to this matter.

Dated, Bronx, New York,
October 3, 1969.

SEYMOUR ROTKER

Plea

SUPREME COURT : BRONX COUNTY

TRIAL TERM : PART XII

THE PEOPLE OF THE STATE OF NEW YORK

-against-

RUDOLPH SANTOBELLO,

Defendant.

Ind. No. 3024-68
Promoting Gambling First Degree

Bronx, June 16, 1969

BEFORE: HON. CHARLES MARKS,

JUSTICE

APPEARANCES:

FOR THE PEOPLE: BURTON B. ROBERTS ESQ.
District Attorney, Bronx County
BY: DAVID GREENFIELD, ESQ.
Assistant District Attorney

Plea

FOR THE DEFENDANT; M. FRUCHTMAN, ESQ.

Miriam Benson, C.S.R.
Official Court Reporter

[2] The Court Clerk: People versus Rudolph Santobello, nine on pretrial.

(Defendant present.)

(Mr. Rotker standing by.)

Mr. Fruchtman: If your Honor please, this defendant desires to withdraw his plea of not guilty heretofore entered and offers to plead guilty to the crime of possession of gambling records as a misdemeanor, what's the section?

Mr. Greenfield: Under second count.

Mr. Fruchtman: Pleads guilty of possession of gambling records, misdemeanor under the second count of the indictment to cover the indictment.

The Court: What is it?

Mr. Greenfield: Possession of gambling records in the second degree, Class A misdemeanor.

People recommend acceptance of the offered plea by the defendant.

The facts of the case are briefly this: The defendant on the 13th day of November 1968 did in Bronx County possess with knowledge of the contents thereof, certain slips

of mutual race horse policy, the number of plays on the slips was in the amount of more than 500, your Honor.

Because of the facts in the case and the defendant's desire to plead guilty before the Court, the People do [3] recommend acceptance of his offered plea.

The Court: Let me see the indictment, please.

(Same handed to the Court.)

The Court: Is your name Rudolph Santobello?

The Defendant: Yes.

The Court: And did you hear your lawyer make a statement to me to the fact that you are now withdrawing your previous plea of not guilty?

The Defendant: Yes.

The Court: Do you now withdraw your previous plea of not guilty?

The Defendant: Yes.

The Court: And did you also hear your lawyer make a statement to me to the effect that in your behalf a plea of guilty is being entered to the crime of possession of gambling records, a Class A misdemeanor in the second degree, under the second count of the indictment, that plea to cover the entire indictment? Did you hear him make that statement?

The Defendant: Yes.

The Court: And do you now plead guilty to the crime of possession of gambling rec-

ords in the second degree, a Class A misdemeanor under the second count of the indictment to cover the indictment?

[4] The Defendant: Yes.

The Court: And is this plea of guilty being made of your own free will?

The Defendant: Yes.

The Court: And did you hear the district attorney make a statement to the court as to the facts and circumstances under which this crime was committed by you?

The Defendant: Yes.

The Court: And are those facts true and correct?

The Defendant: Yes, sir.

The Court: In view of the recommendation of the District Attorney and the facts submitted to the Court, the Court will accept a plea of guilty on the part of the defendant to the crime of possession of gambling records, second degree, a Class A misdemeanor under the second count of the indictment; that plea to cover the entire indictment.

(Defendant duly sworn; pedigree taken; and the following statement made: "See yellow sheet".)

The Court: June 30th for sentence. Probation Department.

The foregoing is certified to be true and correct.

s/ Miriam Benson C.S.R.

Plea

SUPREME COURT OF THE STATE OF NEW YORK

BRONX COUNTY : TRIAL TERM PART XVI

THE PEOPLE OF THE STATE OF NEW YORK

-against-

RUDOLPH SANTOBELLO,

Defendant.

Indictment No. 3024/69
(On charge of Poss. Gambling Records as a Misdemeanor)

851 Grand Concourse,
Bronx, New York 10451
January 9, 1970.

B E F O R E:

HON. ABRAHAM J. GELLINOFF,
Justice

A p p e a r a n c e s:

BURTON ROBERTS, ESQ.
District Attorney, Bronx County
For the People

Plea

BY: SEYMOUR ROTKER, Esq.,
Of Counsel

JOSEPH ARONSTEIN, ESQ.
For the Defendant

Herbert Kurtz,
Court Clerk

ESTHER POINTER, C.S.R.
Official Court Reporter

[2] Court Clerk: People of the State of New York vs. Rudolph Santobello.

Mr. Aronstein: Your Honor, I thought perhaps before the motion papers got here, we might acquaint Your Honor with the case.

Your Honor, on June 16, 1969 this defendant, who was then represented by Mr. Max Fruchtman, entered a plea of guilty, and I have a copy of the minutes here, of the sentence, a certified copy of the minutes of the sentence.

The defendant's lawyer said to the Court that he desired to withdraw a plea of not guilty, and plead guilty to the crime of Possession of Gambling Records, as a misdemeanor, under the second count of the indictment, to cover the indictment. And then the Assistant made a statement of what was purported to be — the Assistant, Mr. Greenfield, then made a statement of some of the facts of the case. He did not state all of the

facts. And he recommended the acceptance of that plea. And then the Court states — then his lawyer, the defendant's lawyer made a statement, and the Court talked about entering a plea to Possession of Gambling Records, a Class A Misdemeanor.

And then the Court said, "Do you now plead guilty [3] to the crime of Possession of Gambling Records in the Second Degree, a Class A Misdemeanor, under the second count of the Indictment?" The defendant said "yes". The Court said, "Is this plea of guilty being made of your own free will?" the defendant said, "Yes." "Did you hear the District Attorney make a statement to the facts and circumstances?" The defendant said "Yes." "Are these facts true?" "Yes." Then the Court said, "The Court will accept the plea of guilty on the part of the defendant, to the crime of Possession of Gambling Records, second degree."

Now I contend, Your Honor, that that plea is a plea of guilty to something that is not a crime. The statute makes it a crime to possess gambling records, Number One, two kinds of gambling records. One, knowingly, the most important part is the possession must be knowing the contents of the records.

In other words, a knowing possession. And if the defendant does not plead guilty to knowingly possessing gambling records, then he is not pleading guilty to a crime.

Number Two, the Statute makes two separate, distinct crimes, requiring two

separate and distinct offers of proof to establish these crimes. One is the [4] crime of engaging in bookmaking, and one is the crime of knowingly possessing policy or lottery records or writings.

Now it is my contention that the plea of guilty is not a plea of guilty to a crime, and therefore, this Court is without jurisdiction to impose any sentence, for the reason that the defendant did not plead guilty to a crime.

Now it is true, I made a motion before Judge Marks to withdraw the plea, and that motion was denied. No order has been entered, as far as I know, and I don't really recall whether the Court at that time, in denying the motion, stated that this was the decision and order of the Court. I don't recall whether he said that. However, I've never been served with any copy of any order, or decision, with notice of entry.

Now Number Two, after this plea of guilty, there were motions made. One, to inspect the Grand Jury minutes, one for a motion to suppress the evidence, on the ground it was obtained in violation of the constitutional rights of this defendant, and another motion — no, just those two motions, besides the motion to vacate and set aside the plea of guilty.

[5] Your Honor, I contend that under the case of Kaufman vs. The United States, cited by the United States Supreme Court, I don't have the citation, but I happen to have a copy

of the opinion here. The United States Supreme Court in that case said that a defendant can move to suppress evidence before trial, during trial, and after trial. In other words, as post-conviction relief, even after sentence has been pronounced, to bring a motion to suppress evidence.

And the Court says, "this philosophy inhers in our recognition of state prisioners' post-conviction claims of illegal search and seizure. Plainly, the interest in finality is the same with regard to both federal and state prisoners. With regard to both, Congress has determined the full protection of their constitutional rights require the availability of the mechanism for collateral attack. The right then is not merely to an immediate oral forum, but to the full and fair consideration of constitutional claims.

The availability of post-conviction relief serves significantly to secure the integrity of proceedings at or before trial, and on appeal. No such service is performed by extending rights retroactively.

Thus, collateral relief, unlike retroactive relief, [6] contributes to the present vitality of all constitutional rights, whether or not they bear on the integrity of the fact-finding process."

Now I say that under this case, this defendant has a right to make a motion not only to suppress the evidence, but also to inspect the Grand Jury minutes. And if the indictment was founded on illegal evidence,

then the indictment must fall, at any time before a trial is completed. And a trial is not complete until sentence is pronounced, I contend.

Now I just want to say this to Your Honor. This very same question is going to be decided by the Court of Appeals, because I have a case wherein I was granted leave to go to the Court of Appeals, by Judge Scilleppi. Of course, it hadn't been heard yet. And one of the points raised was that we made a motion after a jury's verdict, to suppress evidence. And the Court at that time stated that the place to make the motion would be upon the appeal, if any appeal is taken. That was the decision of the Court.

This case went to the Appellate Division. They affirmed no opinion, so I don't know whether or not they passed on this question or not, Judge. But anyway, this case, wherein this very question is going to be [7] raised, will be raised in the Court of Appeals.

Now for that reason, I would like to have this sentence adjourned for a reasonable time, so that I could perhaps get a decision from the Court of Appeals on this point.

The Court: All right. The application for an adjournment of sentence is denied.

Mr. Aronstein: All right.

The Court: You have an exception.

Mr. Aronstein: All right. Now how about my motions?

The Court: The Court is very much impressed with the quotations that you made

from the United States Supreme Court decision. The Court does not take issue with the philosphy expressed in that Kaufman decision. But we have here a case where motions were, in fact, made, prior to the taking of a plea, and then while the motions were pending, a plea was taken. The result being, that the motions are, in fact, rendered academic, by the taking of the plea.

Mr. Rotker: If I could interject, the motions specifically to suppress was withdrawn on June 30, 1969, Judge.

[8] The Court: All right. So that —

Mr. Aronstein: But the point is this --

The Court: The point is this, I'm trying to make a record for you, —

Mr. Aronstein: Yes, Your Honor.

The Court: — so that you can — you can review this Court's action. So I'll make it specifically.

The Court rules that by the taking of the plea, these motions are deemed to have been abandoned, and if you want to renew them, no one can preclude you from renewing them, but you will have to do it in the proper way, and in the proper manner. But I will not give you an adjournment to enable you to make those motions.

Mr. Aronstein: Your Honor, just to have the record clear, the motions were made subsequent to the taking of the plea. Those motions are now pending in this court. They were on the calendar December 15th. I believe through a mistake, they were marked off, because they had been on two or three

times before, and adjourned, pending evidently, what may happen on the sentence. I don't know. But these motions are pending. I would like to have number one restored to the calendar here today, and [9] then ask Your Honor to make the decision, with respect to those motions.

If Your Honor rules that those motions are waived, the motions that are pending before this Court are waived, by the fact that a plea of guilty was entered, well then, I just have to abide by Your Honor's ruling, and take an exception.

Now that's what I would ask Your Honor to pass upon.

The Court: So I'm ruling that the plea of guilty waived the further motion, and made the further motions academic.

Mr. Aronstein: Yes.

The Court: And you take an exception to that ruling.

Mr. Aronstein: Yes.

The Court: You maintain that the ruling is contrary to the decision of the United States.

Mr. Aronstein: Now there is just one other thing I want to put on the record, and that is the case of McCarthy vs. The United States, which deals directly with a plea. And I want to state that in the McCarthy case, the Court has stated that the — "The failure of the Court itself, to before accepting [10] a plea of guilty, to advise the defendant to first ascertain what the facts are — advise the defendant as to the law, so the Court will make sure that the defendant un-

derstands what the law is; he understands what he is pleading guilty to; he understands that by a plea of guilty he is waiving his right to a jury trial.

If Your Honor will bear with me for just a moment.

The Court: Yes. He's waiving his right to have the witnesses against him confront him, he's waiving the right to a jury trial, he's waiving all of his constitutional rights; and you say it's a judge's duty to make sure that when he pleads, he knows that he is waiving those rights.

Mr. Aronstein: I say —

The Court: All of those rights, including those that you haven't mentioned, and including those that aren't even mentioned in the McCarthy decision.

Mr. Aronstein: So I contend —

The Court: So you cover it.

Mr. Aronstein: But I contend that under the McCarthy case, Your Honor, that the Court is under a duty to —

The Court: To make sure that the defendant knows.

[11] Mr. Aronstein: Knows precisely what he is pleading guilty to; knows what the law is.

The Court: And knows what rights he is waiving.

Mr. Aronstein: And knows what penalty he may incur by his plea of guilty.

The Court: All right.

Mr. Aronstein: Knows that he is waiving his right to a jury trial. And I contend that in this case, none of those things happened.

The Court: All right. All right. I've got your contention, and everything you have to say is on the record.

Your motions are denied. You have an exception. Your record is complete. Your position is complete.

Arraign him for sentence.

Court Clerk: Rudolph Santobello, is there any legal cause why sentence should not be pronounced against you?

Mr. Aronstein: Just a moment.

The Court: Well, on legal cause, Mr. Aronstein — Mr. Aronstein, on legal cause you repeat the same arguments, and the same grounds, that you have already made, with the same force and effect as though repeated now.

[12] Mr. Aronstein: Yes, Your Honor.

The Court: And in addition, if you have anything to add, that you haven't said, you can say that too. I think, though, you have been pretty thorough.

Mr. Aronstein: I don't believe, Your Honor, that there is anything that I can add to what I have stated before. And I ask Your Honor for leave to adopt what I've said before, as the legal ground as to why sentence should not be pronounced.

The Court: Your application is granted. Everything you have said until now is deemed said now, same arguments, same objections, same motions, and the same rulings, and you have an exception.

Mr. Aronstein: Thank you.

Court Clerk: Have we now completed all

the legal —

The Court: Yes.

Court Clerk: Rudolph Santobello, what have you to say before sentence is now pronounced against you according to the law? Your attorney may speak for you.

Mr. Aronstein: You want me to speak?

The Defendant: Yes.

Mr. Aronstein: Your Honor, I know very well that there is a probation report in this case. I'm sure [13] that Your Honor has read and considered it. Of course, I have to maintain the same position. It is our contention that the defendant did not plead guilty to any crime. However, I assume it would be the District Attorney's position that he pleaded guilty to the crime of Knowingly Possessing Policy Writings, as a Class A Misdemeanor; and the circumstances of this particular case are that some man put some papers in a compartment in the wall, some police officer went over and took those papers, put some identifying marks in those papers, and put the papers back, and that this defendant came later and took those papers, and was thereupon arrested, by this police officer, who searched him and found the papers that he had previously marked, and then conducted a search, which I considered to be an illegal search, of the automobile which he was in, and found some other records in there, which were made a part of this case.

So far as I can see, this case is nothing more than an ordinary policy case, which I think should have been a misdemeanor in the

first place. And for some reason or other, they made it a felony charge.

The Court: All right.

Mr. Rotker: May I be heard, Your Honor?

[14] Your Honor, as counsel said, in the full and complete probation report, the Probation Department report is something, of course, which is an aid to the Court, to determine what sentence should be imposed upon a defendant; for his illegal conduct, after a defendant has been found or pleads guilty.

I have no idea what is in that probation report, but I do know something about the defendant Santobello, and I'm sure that there is nothing in that report, based upon my knowledge, not of the report, but of the defendant Santobello, that would in any way commend him for your mercy or other consideration, with regard to the imposition of sentence here.

Your Honor, defendant is a man who has had a criminal record going back to 1950. He has been in trouble since being a youngster, and served fourteen years in jail, or thereabouts, for the brutal homicide of a police officer, acting in concert with another man.

After he got out, he probably became some sort of a hero, and then went into the less violent type of activity, but engaged in illegal gambling activity, which is indicated. I don't know if there was a conviction, but at least by an arrest in 1966, and [15] a subsequent arrest in 1969 for the charge for which the defendant is presently

before the Court.

In the interim, he is also called as a witness before a grand jury in New York County. The grand jury in New York County was seeking to ascertain whether or not a firm called Service Loaders did in fact hire various indigent individuals, and pay them certain amounts of money for activities that these indigent individuals were doing for Service Loaders, and in fact, Santobello and some ten or eleven or twelve other gamblers, men who have long histories of gambling activity, keep them on their payrolls.

This defendant, when he was arrested, had $636.00 on his person. I am sure that he has no legitimate source of business income.

It is the People's contention, Your Honor, based upon law enforcement, based upon every conceivable type of investigative ability, that this defendant is involved with organized criminal activity, in the illegal gambling activity. He also has some connection, Your Honor, to a bar in Bronx County, the Chez Joey Bar, up on Eastchester Road, in Bronx County.

The man has no apparent visible source of income, [16] and yet seems to have fantastic amounts of money, and is engaged in these type of activities.

Your Honor, there is nothing that commends him for the Court's consideration. The People would ask that the Court deal stringently and harshly with this defendant, by imposing a maximum sentence that the law

can impose in such a case.

Mr. Aronstein: Now if the Court pleases, may I reply?

The Court: Sure.

Mr. Aronstein: Mr. Fruchtman, the lawyer who was present, and was this defendant's attorney, at the time of the plea, told me, and told me that he will testify under oath, that at the time he took the plea, Mr. Greenfield, the Assistant District Attorney told him that the District Attorney will not make any recommendations, with respect to the sentence. And I therefore, ask that at this time this Court adjourn this sentence for a short period of time, I'll produce Mr. Fruchtman, and — in court, and have him testify in open court, as to what —

Now if what Mr. Fruchtman says is true, then the plea was obtained by fraud and deception, by the District Attorney, if it was obtained on the expressed [17] promise that the District Attorney would make no recommendation.

Mr. Rotker: Your Honor, I have the plea taking minutes here. There is nothing to indicate whatsoever, that that in fact took place.

The Court: All right.

Mr. Aronstein: I don't say it's in the sentencing minutes.

Mr. Rotker: In the plea minutes.

Mr. Aronstein: This was a discussion between Mr. Fruchtman and the District

Attorney.

The Court: All right.

Mr. Aronstein: Prior to the acceptance of the plea.

The Court: Mr. Aronstein, I am not at all influenced by what the District Attorney says, so that there is no need to adjourn the sentence, and there is no need to have any testimony. It doesn't make a particle of difference what the District Attorney says he will do, or what he doesn't do.

I have here, Mr. Aronstein, a probation report. I have here a history of a long, long serious criminal record. I have here a picture of the life history of this man. And I come to the conclusion, regardless [18] of what the District Attorney —

You want to interrupt me, I'm ready to make my sentence, and there is nothing further to be said. But if you want to say something, I'll interrupt the sentence, and say it.

Mr. Aronstein: I'm sorry.

The Court: Say it. Because when I get finished, there is nothing for you to say. So if you want to say it, say it now.

Mr. Aronstein: No. I don't know why I raised my hand.

The Court: You finished?

Mr. Aronstein: Probably just a reaction.

The Court: You finished?

Mr. Aronstein: Yes.

The Court: Nothing more to say?

Mr. Aronstein: Yes.

The Court: All right. "He is unamenable

to supervision in the community. He is a professional criminal." This is in quotes. "And a recidivist. Institutionalization —"; that means, in plain language, just putting him away, "is the only means of halting his anti-social activities", and protecting you, your family, me, my family, protecting society. "Institutionalization". Plain language, put him behind bars.

[19] Under the plea, I can only send him to the New York City Correctional Institution for men for one year, which I am hereby doing.

The sentence is, the defendant be committed to the New York City Correctional Institution for men for one year.

You have an exception to the Court's ruling. You have an exception to the Court's procedure. You deny any foundation for the Court's statements, on the record, at the time of sentence. You object to them.

Your objection is overruled. You have an exception.

You can now say anything else you want to protect the record.

Mr. Aronstein: All right. Well Number One, will Your Honor grant a stay of the sentence until Monday, so he can arrange —

The Court: Application denied.

Mr. Aronstein: All right. Could I approach the Bench with the Assistant?

The Court: Yes.

Plea

(Whereupon, at this time a discussion was held, off the record, between the Court and the Assistant District Attorney and Mr. Aronstein, following which [20] these proceedings took place:)

Court Clerk: Rudolph Santobello, your attorney informed you of your right to appeal, and the manner in which you go about making such an appeal?

The Court: All right. Let's go ahead.

Court Clerk: I have to get an answer to this question.

Mr. Aronstein: Oh, about the appeal.

Court Clerk: His answer? I asked him has his attorney informed him of his right to appeal, and the manner in which you go about making such an appeal.

Has your attorney informed you of that?

The Defendant: Yes, sir.

Court Clerk: All right. That completes the sentence.

(The above is certified to be a true and accurate verbatim transcript of the minutes in this case.)

s/ Esther Pointer, C.S.R.
Official Court Reporter

Decision Granting Certificate of Reasonable Doubt

SUPREME COURT : BRONX COUNTY
SPECIAL TERM : PART I

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

RUDOLPH SANTOBELLO,

Defendant-Appellant.

Filed: Jan. 15, 1970

TYLER, J.:

This is an application for a certificate of reasonable doubt under Section 527, et seq., of the Code of Criminal Procedure. The defendant was convicted by plea of the crime of knowingly possessing criminal records, under Section 225.15 of the Penal Law. A maximum sentence of one year was imposed by this Court on January 9, 1970.

An examination of the specifications of error assigned by the defendant is not persuasive that a reasonable arguable question should be passed

upon by an appellate court in this case, save one. The maximum sentence of one year imposed herein may well be found by the appellate court to be excessive. In the event that the appellate court should make such a finding, it is probable that the defendant will have substantially completed his sentence and the question of the excessiveness of the sentence thus rendered moot.

Therefore, in the exercise of discretion, I am constrained to grant the certificate of reasonable doubt and will hear counsel for the defendant and the People on the question of bail.

Dated: January 15, 1970

A.R.T.
J.S.C.

Judgment of Affirmance of Appellate Division, First Judicial Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 1st day of December, 1970

Present —

Justice Presiding,

HON. SAMUEL W. EAGER,

Judgment of Affirmance of Appellate Division, First Judicial Department

" LOUIS J. CAPOZZOLI,
" OWEN McGIVERN,
" ARON STEUER,
" GEORGE TILZER,
Justices.

2884

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

RUDOLPH SANTOBELLO,

Defendant-Appellant

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, Bronx County (Gellinoff, J.), rendered on January 9, 1970, convicting him of the crime of Possession of Gambling Records in the Second Degree [Penal Law §225.15]; and defendant-appellant having also brought up for review an order of said Court denying a hearing upon a motion to suppress evidence, an order denying a hearing on a motion for an inspection of the minutes of the grand jury, and an Order denying the motion to withdraw the plea of guilty entered on June 16, 1969: and said appeal having been argued

Judgment of Affirmance of Appellate Division, First Judicial Department

by Mr. Irving Anolik, of counsel for the appellant, and by Mr. Daniel J. Sullivan, of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment and orders so appealed from be and the same are hereby, in all things, affirmed.

ENTER:

HYMAN W. GAMSO
Clerk

Certificate Denying Leave to Appeal to Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

Before:

HON. ADRIAN P. BURKE,

Associate Judge

[TITLE OMITTED IN PRINTING]

I, ADRIAN P. BURKE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to §520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought

Certificate Denying Leave to Appeal to Court of Appeals

to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York City, New York
February 4th, 1971

s/ ADRIAN P. BURKE
Associate Judge

IN THE

Supreme Court of the United States

October Term, 1970

No. 1480

(Now No. 70-98)

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

RUDOLPH SANTOBELLO,
Petitioner.

On Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department
Petition for Certiorari Filed March 18, 1971
Certiorari Granted May 29, 1971

SUPPLEMENTAL APPENDIX

BURTON B. ROBERTS
District Attorney
Bronx County
Attorney for Respondent
851 Grand Concourse
Bronx, New York 10451
(212) 588-9500

TABLE OF CONTENTS

Motion to Suppress Evidence

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX

THE PEOPLE OF THE STATE OF NEW YORK,

against

RUDOLPH SANTOBELLO,

Defendant.

SIR:

PLEASE TAKE NOTICE that upon all of the proceedings heretofore had herein and upon the annexed affidavit of Rudolph Santobello duly verified the 19th day of April, 1969, the undersigned will move this Court at Part XII thereof, at the Courthouse, located at 851 Grand Concourse, in the County of Bronx, City and State of New York, on the 17 day of June, 1969, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for an order, pursuant to the Code of Criminal Procedure, granting a hearing for the purpose of suppressing and returning evidence allegedly seized herein and suppressing all statements obtained as a result of said illegal search and seizure, upon the ground that the evidence allegedly was seized in violation of the defendant's rights under the Constitutions and Statutes of the United States and the State of New York, together with such other, further and

different relief as to this Court may seem just and proper in the premises.

Dated: New York, New York
April 12, 1969

Yours, etc.,

Fruchtman and Lindenauer
Attorneys for Defendant
Office & P.O. Address
250 West 57th Street
New York, New York
PL 7-4555

To:

Hon. Burton B. Roberts
District Attorney
Bronx County

Affidavit of Rudolph Santobello, Sworn to April 19, 1969, in Support of Motion to Suppress Evidence

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX

[SAME TITLE]

State of New York)
County of)
City of New York) ss.:

RUDOLPH SANTOBELLO, being duly sworn, deposes and says:

That he is a defendant in the above entitled action and makes this affidavit in support of the within motion for an order, pursuant to the Code of Criminal Procedure, granting a hearing for the purpose of suppressing and returning the evidence allegedly seized herein, upon the ground that the evidence allegedly seized was seized in violation of your deponent's constitutional rights.

On or about the 9th day of December, 1968, your deponent was indicted by the Grand Jury of Bronx County and charged with the crime of promoting gambling in the first degree and the crime of possession of gambling records in the first degree.

Your deponent denies that the officer observed him engaged in any illegal activity.

The arrest of your deponent was without probable cause and without either a search warrant and/or an arrest warrant.

Affidavit of Rudolph Santobello

Your deponent is a person aggrieved by an illegal search and seizure which occurred on November 13th, 1968.

As a result of this illegal arrest and unreasonable search and seizure following it, the evidence seized hereunder was seized contrary to law and in violation of your deponent's rights, pursuant to the Constitution of the United States, the Constitution of the State of New York, and the Code of Criminal Procedure, and should be suppressed and returned.

That no other application has been made for the relief prayed for herein to any other Court of judge thereof.

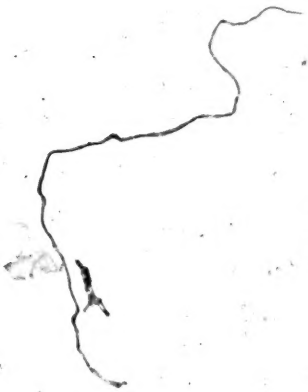
WHEREFORE, your deponent respectfully prays that an order be made granting a hearing to your deponent for the purpose of suppressing and returning the evidence allegedly seized in violation of the rights of your deponent under the Constitutions and Statutes of the United States and the State of New York, and for such other, further and different relief as to this Court may seem just and proper in the premises.

Rudolph Santobello

(Sworn to April 19, 1969.)

Endorsement on Motion to Suppress Evidence

(See Opposite ☞)



Sir: — Please take notice that the within is a (certified) true copy of a duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

STUCHMAN and LINDENAUER

Attorneys for

Office and Post Office Address

250 West 57th Street

Borough of Manhattan New York, N. Y. 10019

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir: — Please take notice that an order of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

STUCHMAN and LINDENAUER

Attorneys for

Office and Post Office Address

New York, N. Y. 10019

SUPREME COURT OF THE STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

-against-

RUDOLPH SANTOBELLO,

Defendant.

NOTICE OF MOTION AND AFFIDAVIT

STUCHMAN and LINDENAUER

Attorneys for Defendant

Office and Post Office Address, Telephone

250 West 57th Street

Borough of Manhattan New York, N. Y. 10019

PL 7-4555

To

Attorney(s) for

Service of a copy of the within is hereby admitted.

Dated,

Attorney(s) for

1969 JUN -9 AM 10:01

DISTRICT ATTORNEY

BRONX COUNTY

Best Available Copy

Motion to Inspect Grand Jury Minutes, or in the Alternative, to Dismiss the Indictment

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Rudolph Santobello, sworn to the 29th day of September, 1969 and upon the affirmation of Joseph Aronstein, dated September 29, 1969, the attorney for the above named defendant, and upon all the proceedings heretofore had herein, the undersigned will move this Honorable Court, at a Term thereof to be held on the 8th day of October, 1969, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, at the Court House, 161 Street and Grand Concourse, County of Bronx, City and State of New York, for an Order for the inspection of the minutes of the Grand Jury that returned indictment #3024-1968, against the defendant upon the grounds set forth in the affidavits herein, or, in the alternative, for an Order dismissing the Indictment and for such other and further relief as may be just and proper.

Dated, New York, N.Y.
September 29, 1969

Yours, etc.,

Joseph Aronstein
Attorney for Defendant
Office & P.O. Address
1650 Broadway
New York, N.Y. 10019
Telephone PL 7-8671

To:

Clerk of Court;

Hon. Burton D. Roberts
District Attorney
Bronx County

Affidavit of Rudolph Santobello, Sworn to September 29, 1969, in Support of Motion to Inspect Grand Jury Minutes, or in the Alternative, to Dismiss the Indictment

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX

[SAME TITLE]

State of New York)
County of Bronx) ss.:

Rudolph Santobello, being duly sworn, deposes and says: that he is the above named defendant and that he has been indicted by the Grand Jury of Bronx County, Indictment #3024-1968 charging violation of the Gambling Laws of the State of New York in two counts.

Deponent states that he has read the Information filed against him in the Criminal Courts of the County of Bronx November 13, 1968, duly sworn to by Police Officer F. Serpico, and that he has been informed by his attorney, Joseph Aronstein, that said Information fails to allege that the slip of paper that he removed from the compartment in the wall of the building was a paper containing writings representing plays of Mutual Race Horse Policy that had been received by deponent from a person other than a player, and that the failure to negative this exception contained in the statute is fatal to the validity of the said Information, and, that deponent has been further informed by Joseph Aronstein that based upon the sworn Information of Officer Serpico, the testimony given by Officer Serpico upon which the indictment is founded is lacking in this important testimony, and the failure of the People

before the Grand Jury to adduce evidence that the slip of paper removed by Officer Serpico from the compartment in the wall of the building was received by deponent from a person other than a player would result in insufficient legal evidence upon which the indictment is founded.

Wherefore, deponent respectfully prays that this Court make an Order granting an inspection of the minutes of the Grand Jury upon which the indictment herein is based, or in the alternative, for an Order, dismissing the Indictment, and for such other and further relief as may be just and proper, for which no previous application for the relief herein prayed for has heretofore been made.

Rudolph Santobello

(Sworn to September 29, 1969.)

Affirmation of Joseph Aronstein, Esq., Dated September 29, 1969, in Support of Motion to Inspect Grand Jury Minutes, or in the Alternative, to Dismiss the Indictment

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX

[SAME TITLE]

Joseph Aronstein, attorney at law, does hereby affirm, under the penalties of perjury, pursuant to the provisions of Section R2106, C. P. L. R. that he is the attorney for the above entitled defendant and that he is personally familiar with all of the facts of this case.

Deponent states that he has read the indictment, 3024-1968, filed against the defendant and that such indictment contains two counts, Count 1, charging that the defendant did receive on November 13, 1968, in connection with a lottery and policy scheme and enterprise, written records from a person other than a player whose chances and plays were represented by such records, and Count 2, charging that the defendant was in possession of gambling records, in that he did on November 13, 1968, possess with knowledge of the contents thereof, writings, etc., reflecting and representing more than five hundred plays and chances of a kind commonly used in the operation and promotion of a lottery and policy scheme.

Deponent has read the Information filed against this defendant November 13, 1968 in the Criminal Court, County of Bronx, duly sworn to by Officer Serpico and that said Information does not negative the exception contained in the statute, to wit, that the policy writings, etc., allegedly

received by the defendant were received from a person other than a player.

Deponent states that based upon the sworn Information of Officer Serpico that fails to negative the exception and, the fact, that according to the Information Officer Serpico was the only witness, there being no corroborating affidavit in support of the Information, the evidence adduced before the Grand Jury fails to establish that the slip of paper containing writings commonly used in the operation and promotion of a lottery and policy scheme were received by the defendant from a person other than a player and that the failure of the evidence to establish before the Grand Jury that the slip of paper containing the writings commonly used in the operation and promotion of a lottery and policy scheme were received by the defendant from a person other than a player would make such evidence insufficient to sustain the indictment.

Defendant states that Count 2 of the Indictment is duplicitious in that said count charges the same crime as is charged in Count 1 of the Indictment, since count 1 of the Indictment charges that on November 13, 1968 the defendant did receive papers and writings it follows that said count 1 charging that he had received papers and writings, said papers and writings would be in his possession, and therefore Count 2 of the Indictment is duplicitious in that it charges the same crime as is charged in Count 1.

Deponent states that with respect to the allegations contained in the affidavit of the defendant, that he has informed such defendant with reference to those allegations as set forth therein.

Dated, New York, N.Y.
September 29, 1969.

Joseph Aronstein

Proceedings of June 17, 1969

Motion to Suppress Evidence

SUPREME COURT—BRONX COUNTY

TRIAL TERM—PART XII

Ind. No. 3024—1968

PEOPLE OF THE STATE OF NEW YORK

against

RUDOLPH SANTOBELLO

Defendant.

June 17, 1969

Before: Hon. CHARLES MARKS, Justice

Appearances:

For the People:

Burton B. Roberts, Esq.
District Attorney, Bronx County
By: Seymour Rotker, Esq.
Assistant District Attorney

Miriam Benson, C.S.R.
Official Court Reporter

Proceedings of June 17, 1969

Mr. Rotker: Your Honor, I think this motion which has been made previously should be abandoned because Rudolph Santobello, I believe, on the same case took a plea yesterday. He took a plea in court to a gambling violation.

The Court: We put it over to June 30th.

Mr. Rotker: May we have this motion adjourned to that date, til the date of sentence? Counsel can withdraw the motion. No counsel here.

The Court Clerk: Fruchtman & Lindenauer?

(No response)

The Court: June 30th.

The foregoing is certified to be a true and correct transcription of the original stenographic minutes.

/s/ Miriam Benson

Miriam Benson, C.S.R.
Official Court Reporter

Proceedings of June 30, 1969

Motion to Suppress Evidence

SUPREME COURT—BRONX COUNTY

TRIAL TERM—PART XII

Ind. No. 3024—1968

THE PEOPLE OF THE STATE OF NEW YORK

against

RUDOLPH SANTOBELLO

Defendant.

Bronx, New York
June 30, 1969

Before: Hon. CHARLES MARKS, Justice

Appearances:

Fruchtman & Lindenauer, Esqs.
Atorneys for Defendant
By: Max Fruchtman, Esq.
Of Counsel

Emily Davis, C.S.R.
Official Court Reporter

Proceedings of June 30, 1969

Mr. Fruchtman: Judge this is a plea; do you want to take the sentence now?

Court Clerk Zumpano: Do you want to withdraw the motion?

Mr. Fruchtman: Yes.

The Court: Motion withdrawn.

Mr. Fruchtman: Does your Honor want to take the sentence now?

The Court: I haven't got the papers. I have to put it over. Wednesday.

Certified to be a true and accurate transcription of the original stenographic record.

/s/ Herbert S. Reing,

Herbert S. Reing, C.S.R.
Official Court Reporter

Proceedings of September 16, 1969

Possession of Gambling Records

SUPREME COURT—BRONX COUNTY.

TRIAL TERM—PART XIX

Ind. No. 3024—1968

PEOPLE OF THE STATE OF NEW YORK

against

RUDOLPH SANTOBELLO

Defendant.

September 16, 1969

Before: Hon. CHARLES MARKS, Justice

Appearances:

For the People:

Burton B. Roberts, Esq.
District Attorney, Bronx County
By: Maurice Sieradzki, Esq.
Assistant District Attorney

For the Defendant:

M. Fruchtman, Esq.

Miriam Benson, C.S.R.
Official Court Reporter

Proceedings of September 16, 1969

The Court Clerk: People of the State of New York against Rudolph Santobello, number 3 on the sentence calendar.

The Court: In view of the Probation Report, I'll put it over for one week. That's—

The Court Clerk: 23rd, Judge.

The Court: 23rd.

Mr. Fruchtman: May I check my calendar?

The Court: Yes.

Mr. Fruchtman: 23rd.

The Court: All right, September 23rd.

The Court Clerk: September 23rd.

The Court: Bail continued.

The foregoing is certified to be a true and correct transcription of the original stenographic minutes in the above case.

/s/ Miriam Benson

Proceedings of September 23, 1969

Possession of Gambling Records (misd.)

SUPREME COURT—BRONX COUNTY

TRIAL TERM—PART XIX

Ind. No. 3024—1968

PEOPLE OF THE STATE OF NEW YORK

against

RUDOLPH SANTOBELLO

Defendant.

September 23, 1969

Before: Hon. CHARLES MARKS, Justice

Appearances:

For the People:

Burton B. Roberts, Esq.
District Attorney, Bronx County
By: Vincent Vitale, Esq.
Assistant District Attorney

For the Defendant:

Joseph Aronstein, Esq.

Miriam Benson, C.S.R.
Official Court Reporter

Proceedings of September 23, 1969

The Court Clerk: People of the State of New York against Rudolph Santobello, number 2 on the sentence calendar.

Mr. Fruchtman: If your Honor pleases, I represent Rudolph Santobello; but I understand that Aaron Stein is being substituted for me; so may I respectfully ask permission to withdraw? And I think an adjournment should be in order.

Mr. Aronstein: May I file a notice of appearance? Joseph A-r-o-n-s-t-e-i-n, 1650 Broadway. Your Honor, in this case, I prepared two motions: One to withdraw the plea of guilty, and one to suppress the evidence. I propose, after I get—it will be necessary for me to order the minutes of the sentence.

Mr. Fruchtman: Plea of guilty.

The Court: The minutes of the plea, you mean.

Mr. Aronstein: Of the plea, your Honor. In addition, there will be another motion to inspect the grand jury minutes, or in the alternative, dismissing the indictment; also a demurrer with respect to the second count of the indictment which unfortunately I haven't been able to prepare as yet.

I have prepared the motion that I showed to the assistant. I left the return date blank for the reason that I know your Honor would want to fix a date that would be convenient to the Court; and also I'll give the district attorney an opportunity to put in any answering affidavits; and I hope to also submit a memorandum of law which I'll serve upon the district attorney too.

The Court: I don't know what day I'm going to be in next month. I think it's the 20th if I'm not mistaken.

Mr. Aronstein: Your Honor, if I may suggest, if I make the motion returnable in Part XII and then have them referred to your Honor—

Proceedings of September 23, 1969

The Court: Since the matter is still before me, I suppose it would have to be referred.

Mr. Aronstein: Yes, since your Honor doesn't know what part your Honor will be in.

Mr. Vitale: Judge, I think perhaps we should take one motion at a time. In fact, the motion to withdraw the plea, I think, should be the first one because if that's denied, there's no need for the other.

The Court: Yes, then—

Mr. Vitale: So I think that one should remain in front of your Honor.

Mr. Aronstein: With respect to the motion to suppress, under a recent case, in the U.S. Appeal, Kaufman against the U.S.—

The Court: I'll be in Part XVIII.

Mr. Aronstein: Then I would like it returnable to Part XVIII. What date does your Honor—make it for the latter part of October, your Honor.

The Court: Oh, no.

Mr. Vitale: The People will accept the shortest time available to the Court.

The Court: I'm not going to make it for the latter part of October. October 8th.

Mr. Aronstein: October 8th?

The Court: October 8th.

Mr. Vitale: Will counsel please file the notice to the District Attorney's Office?

Mr. Aronstein: I'll file the—

Mr. Vitale: File through the Clerk's Office so we'll have it logged in our office, the District Attorney Clerk's Office.

Mr. Aronstein: The notice?

Mr. Vitale: Yes, the motion papers.

The Court Clerk: October 8th, your Honor?

The Court: October 8th.

Proceedings of September 23, 1969

Mr. Fruchtman: May I approach the bench, your Honor?

The Court: Yes.

(Whereupon Counsellor Fruchtman approaches the bench and confers with the Court off the record.)

The foregoing is certified to be a true and correct transcription of the original stenographic minutes in the above case.

/s/ Miriam Benson

Miriam Benson, C.S.R.
Official Court Reporter

Proceedings of October 8, 1969

Possession of Gambling Records (Misdemeanor)

SUPREME COURT—BRONX COUNTY

TRIAL TERM—PART XVIII

Ind. No. 3024—1968

PEOPLE OF THE STATE OF NEW YORK

against

RUDOLPH SANTOBELLO

Defendant.

October 8, 1969

Before: Hon. CHARLES MARKS, Justice

Appearances:

For the People:

Burton B. Roberts, Esq.
District Attorney, Bronx County
By: Seymour Rotker, Esq.
Assistant District Attorney

For the Defendant:

Joseph Aronstein, Esq.

Miriam Benson, C.S.R.
Official Court Reporter

Proceedings of October 8, 1969

Mr. Rotker: The People were served with three motions as pertains to this case. I think it is two subsequent motions. Two motions must be held in abeyance, pending decision of the first motion, the first motion being a withdrawal of a plea of guilty heretofore entered by Rudolph Santobello to the crime of possession of gambling records as a misdemeanor.

I haven't been in Part XII, but I asked the Court in Part XII to adjourn the motion with the approval of Mr. Aronstein as it pertains to the motion to suppress and to inspect grand jury minutes, pending this Court's determination as to the motion to withdraw the plea.

Mr. Aronstein: May I say they were adjourned to October 23rd, the date we agreed on.

Mr. Rotker: All right.

Mr. Aronstein: All right?

Mr. Rotker: I also ask the Court, all motions of the Court are returnable in Part XII to forward up the motions to withdraw the plea, to your Honor, since this Court took the plea.

Mr. Aronstein: I ask the Court—

The Court: Is that on the papers to withdraw?

Mr. Aronstein: Yes.

Mr. Rotker: Yes.

Mr. Aronstein: I asked the Court to send the papers up there.

Mr. Rotker: I'm sure if they haven't been sent up, they would be sent up or they're on the way.

The Court: I haven't received them yet.

Mr. Rotker: The only thing I have, is an affidavit in opposition. I forwarded a copy to Mr. Aronstein.

Mr. Aronstein: I've received it.

Mr. Rotker: Now, briefly, the affidavit isn't long. The People would respectfully ask that this matter be set down for a hearing to determine the factual issues in this case

as to whether or not this defendant should be permitted to withdraw his plea.

I believe that the evidence presented in the form of affidavit at this posture is insufficient to warrant that and I would like to have a full hearing on the question, including having an opportunity to speak with the—or to call as a witness Mr. Fruchtman who represented Mr. Santobello at the time of the original plea.

I believe that the questions raised with regard to this matter, warrant a full determination of the factual issues here on the grounds raised by the defendant in his moving papers to withdraw his plea, claiming he was unaware of certain constitutional rights, and the fact that the Court in some way erred in the taking of the plea; since those are the bases of his application, I think that a hearing should be had.

The Court: Do you have a copy of the application?

Mr. Rotker: I've got my copy, Judge.

The Court: I just want to look at it for a moment.

Mr. Rotker: I have my copy.

Mr. Aronstein: I have the minutes of the—

The Court: It probably will be up sometime during the week.

Mr. Greenfield: We have the minutes in the matter.

Mr. Aronstein: I would like to tell Mr. Rotker the case I'm just relying on, the case that was just decided in the U.S. Supreme Court, the October term of 1968.

The Court: That's a year ago, you mean?

Mr. Aronstein: McCarthy against the U.S. but it was only announced April 2nd, 1969.

The Court: I'm familiar with it.

Mr. Aronstein: Yes, and—

The Court: There's a motion in another matter on which I was a witness in the Federal Court.

Mr. Aronstein: Yes, and a certain Judge—

Proceedings of October 8, 1969

The Court: And a certain judge decided a certain matter which is now up on appeal in the Circuit Court of Appeals.

Mr. Aronstein: And I intended to tell Mr. Rotker about this case which I'm sure he must be familiar with; so can we have this put down for the 23rd, your Honor, the same time we have the other?

Mr. Rotker: I understand, your Honor, I don't have McCarthy, but I understand there was a cut-off date set down on McCarthy. I'm not sure what the dates are with the Supreme Court, and the cut-off dates—before it is good, and after it is no good. I would like to be given an opportunity to at least review that, but I would ask the Court to specifically set the matter down for a hearing; and I can subpoena witnesses for that day.

The Court: Do you want the 23rd?

Mr. Rotker: The 23rd is convenient for the People if it is convenient for the Court.

The Court: 23rd then.

Mr. Rotker: Thank you.

The Court: Bail continued, October 23rd, hearing.

The foregoing is certified to be a true and correct transcription of the original stenographic minutes in the above case.

/s/ Miriam Benson

Miriam Benson, C.S.R.
Official Court Reporter

Proceedings of October 23, 1969

Possession of Gambling Record

SUPREME COURT—BRONX COUNTY

TRIAL TERM—PART XVIII

Ind. No. 3024—1968

PEOPLE OF THE STATE OF NEW YORK

against

RUDOLPH SANTOBELLO

Defendant.

October 23, 1969

Before: Hon. CHARLES MARKS, Justice

Appearances:

For the People:

Burton B. Roberts, Esq.
District Attorney, Bronx County
By: Maurice Sieradzki, Esq.
and
Seymour Rotker, Esq.

For the Defendant:

Joseph Arnstein, Esq.
1650 Broadway
New York, New York

Miriam Benson, C.S.R.
Official Court Reporter

Proceedings of October 23, 1969

The Court Clerk: People of the State of New York against Rudolph Santobello on the sentence calendar.

Mr. Sieradzki: Second call, your Honor. I believe counsel will be up.

The Court: Marked ready.

The Court Officer: Second call; all right?

The Court: All right.

The Court Clerk: People of the State of New York against Rudolph Santobello.

Mr. Arnstein: I understand we're to have a hearing on this motion today.

Mr. Rotker: Your Honor, I—

The Court: I don't see any necessity for a hearing.

Mr. Rotker: It was set down in the event the Court should feel there are any facts necessary to be elicited above and beyond the papers submitted by the defendant and his counsel.

The Court: What are you going to add to it besides your papers?

Mr. Arnstein: Well, I believe the District Attorney said he was going to call Mr. Fruchtman. I relied on that. I figured he would be here because—

The Court: As to what? What would he testify to? As to what?

Mr. Rotker: Your Honor, I don't know what he would testify to, but I had indicated that that's the possible witness that I would call. However, if the Court feels there is sufficient fact information before the Court in the papers, there is no necessity for a hearing.

The Court: Come up here.

Proceedings of October 23, 1969

(Whereupon Assistant District Attorney Rotker and Counsellor Arnstein approach the bench and confer with the Court off the record.)

The Court: October 29th.

The foregoing is certified to be a true and correct transcription of the original stenographic minutes in the above case.

/s/ Miriam Benson

Miriam Benson, C.S.R.
Official Court Reporter

Proceedings of October 29, 1969

Motion to Withdraw Plea
Possession of Gambling Records (misdemeanor)

SUPREME COURT—BRONX COUNTY

TRIAL TERM—PART XVIII

Ind. No. 3024—1968

PEOPLE OF THE STATE OF NEW YORK

against

RUDOLPH SANTOBELLO

Defendant.

October 29, 1969

Before: Hon. CHARLES MARKS, Justice

Appearances:
None

Miriam Benson, C.S.R.
Official Court Reporter

Proceedings of October 29, 1969

The Court Clerk: People of the State of New York against Rudolph Santobello on the sentence calendar.

The Court: I just received one brief. This went over to, I believe, November 19th. Isn't that the one that went over?

The Court Clerk: No, Judge, 10-29.

The Court: I know, but they were supposed to submit briefs. I got one brief this morning, but I didn't get it from the district attorney.

The Court Clerk: All right, Judge, the indictment on the case today, you want to put it over for the 19th?

The Court: Yes, November 19th.

The foregoing is certified to be a true and correct transcription of the original stenographic minutes in the above case.

/s/ Miriam Benson

Proceedings of November 26, 1969

Motion to Withdraw Plea
Poss. of Gambling Records, Misd.

SUPREME COURT—BRONX COUNTY

TRIAL TERM—PART XX

Ind. No. 3024—1968

PEOPLE OF THE STATE OF NEW YORK

against

RUDOLPH SANTOBELLO

Defendant.

November 26, 1969

Before: Hon. CHARLES MARKS, Justice

Appearances:

For the Defendant:

Joseph Aronstein, Esq.

Eugene Sattler
Official Court Reporter

Proceedings of November 26, 1969

The Court Clerk: People of the State of New York against Rudolph Santobello.

The Court: The motion to withdraw the plea is denied; and I am putting the sentence over to January 10th. Make that January 9th.

Mr. Aronstein: Will your Honor—does your Honor want me to prepare an order, just so that it will be in the record?

The Court: Prepare an order on that. Submit it to me. Bail continued.

The foregoing is certified to be a true and correct transcription of the original stenographic minutes in the above case.

/s/ Eugene Sattler

Eugene Sattler
Official Court Reporter

Proceedings of December 15, 1969

SUPREME COURT—STATE OF NEW YORK

PART XII—BRONX COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

against

RUDOLPH SANTOBELLO,

Defendant.

December 15, 1969

Bronx, New York

Before:

Hon. DAVID ROSS, Justice.

Appearances:

For the People:

Burton B. Roberts, Esq.
District Attorney, Bronx County
By: Assistant District Attorney Greenfield

For the Defendant:

J. Aronstein, Esq.

Ruth Urbanek
Court Reporter

Proceedings of December 15, 1969

Mr. Greenfield: If your Honor pleases, for the record, Santobello pleaded guilty and he sought to withdraw his plea of guilty before Judge Marx. His attorney made a motion on behalf of this defendant to withdraw his plea and we have been waiting for Judge Marx's decision. I believe these motions should be marked off the calendar pending any possible appeal the defendant might make to the withdrawal situation at the time of sentence.

Certified as a true and accurate transcript.

/s/ Ruth Urbanek

Ruth Urbanek
Court Reporter

Letter from the Bronx County Clerk to the Clerk of the Supreme Court of the United States Concerning Certification of the Original Record from the Supreme Court of the State of New York, County of Bronx

August 24, 1971

Honorable E. Robert Seaver
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Rudolph Santobello v. New York
No. 1480, October Term, 1970

Dear Mr. Seaver:

At the request of the Bronx County District Attorney's Office, I have been asked to communicate with you respecting the State Court record in the above matter which I certified on June 14, 1971, pursuant to your direction.

It has been called to my attention that the Appendix filed by the petitioner's appellate counsel, Irving Anolik, Esq. (pages 5a to 10a), contains printed reproductions of a notice of motion to withdraw a plea of guilty, dated September 23, 1969; the supporting affidavit of the petitioner Rudolph Santobello, and the supporting affirmation of the then defense counsel, Joseph Aronstein, Esq. However, the record as certified by me contains no reference to the said motion.

After a search made by my staff of the records of the Supreme Court of the State of New York, County of Bronx, the originals of the aforesaid papers cannot be located. However, ancillary records reveal that such a motion was made. According to those records, the motion returnable on October 8, 1969, was received on September 24, 1969.

Justice Charles Marks, since retired, denied the motion on November 26, 1969, which fact is reflected in the Court's daily calendar and, I have been given to understand by the District Attorney, and in reporter's minutes for that day (reproduction of which, I am advised, will be included in the respondent's Supplemental Appendix). However it should be noted that the appropriate motion book kept by the Supreme Court of Bronx County does not reflect the disposition of the motion.

My investigation of this matter further indicates that members of my staff unsuccessfully conducted an intensive search, in January, 1970, for the original motion papers at the behest of the Bronx County District Attorney's Office. At my direction, another search for the missing papers was recently conducted but said search was also unsuccessful.

If there is any further information you may require of me in connection with the above, please so advise me and I will be glad to furnish the same.

Very truly yours,

Leo Levy
County Clerk
and
Clerk of the Supreme Court,
Bronx County

C.C. Honorable Burton B. Roberts
District Attorney, Bronx County

Irving Anolik, Esq.
225 Broadway
New York City, New York

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1480~~ 70-98

RUDOLPH SANTOBELLO,

Petitioner,

—v.—

NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

IRVING ANOLIK,
Attorney for Petitioner,
225 Broadway,
New York, N. Y. 10007.
(212) 732-3050

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Supreme Court of the United States

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Petitioner,

—v.—

NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

Statement

Petitioner, Rudolph Santobello, prays that a writ of certiorari issue to review the order of the Supreme Court of the State of New York, Appellate Division, First Department, rendered the 1st day of December, 1970, which unanimously affirmed the conviction of the Petitioner for the crime of possession of gambling records in the second degree (N.Y. Penal Law § 225.15) upon his plea of guilty in the Supreme Court of the State of New York, County of Bronx, before Justice Abraham Gellinoff. The Petitioner was sentenced to the maximum term provided by law for this crime, namely one year imprisonment.

Mr. Justice John Marshall Harlan of this Court, on the 16th day of February, 1971, granted Petitioner bail pending the timely filing (by March 22, 1971) and disposition of the within petition for certiorari.

Opinion Below

No opinion was rendered by the Appellate Division in unanimously affirming the judgment of conviction. A copy of the decision of that Court is annexed hereto and marked *Exhibit I.*

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1257(3). A timely application for leave to appeal to the Court of Appeals of the State of New York was made but such leave to appeal was denied by Associate Judge Adrian P. Burke in a certificate dated February 4, 1971, a copy of which is annexed hereto and marked *Exhibit II.*

The Questions Presented for Review

1. Whether Defendant-Petitioner, Rudolph Santobello, was denied due process of law under the Fifth and Fourteenth Amendments of the United States Constitution when he was fraudulently induced to plead guilty upon the promise of an Assistant District Attorney that no recommendation whatsoever would be made as to sentence, but that at the time of sentence a vehement supplication was made by the District Attorney to the Court requesting maximum punishment under law, which recommendation met with

complete success since the Court imposed the severest penalty allowed by the law?

2. Whether the deliberate breaking of a promise made by a District Attorney to a defendant to induce a plea of guilty may be disregarded merely because this sentencing judge alleged that he was not influenced by the vehement recommendations for maximum sentence but proclaimed that he would have imposed the maximum sentence anyway? (*North Carolina* v. *Alford,* 400 U.S. 25; *Brady* v. *United States,* 397 U.S. 742).

3. Whether the fact that a Public Prosecutor has induced a defendant to plead guilty by a false promise to withhold any recommendation as to sentence, *ipso facto,* requires vacating of the plea of guilty and a return of the Defendant to his *status quo ante?*

The Prosecutor herein has conceded throughout that the promise to withhold recommendation as to sentence was indeed given and was in fact broken so *there is no dispute about this issue upon this petition.*

The Constitutional and Statutory Provisions Involved

The Fifth and Fourteenth Amendments of the United States Constitution are involved herein as is New York Penal Law § 225.15.

Statement of the Case

The statement of the case herein is going to be very brief because there is no issue of fact raised upon this petition for certiorari. Even in the papers submitted to this Court in opposition to Petitioner's application for bail, the District Attorney of Bronx County, representing the Respondent herein, has conceded that the promise to withhold recommendation as to sentence at the time the Defendant-Petitioner, Rudolph Santobello, pleaded guilty was actually made and at the time of sentence that promise was clearly broken.

The Petitioner herein was originally indicted for two felonies, namely promoting gambling in the first degree and possession of gambling records in the first degree. After a bargain was struck between his then attorney and an Assistant District Attorney (Mr. Greenfield), the Defendant-Petitioner was assured by Assistant District Attorney Greenfield, acting on behalf of the District Attorney's Office, that no recommendation as to sentence would be made if Santobello bargained away his rights by pleading guilty to the lesser charge of possession of gambling records in the second degree, a misdemeanor.

Only after this representation had been made was the plea of guilty to the lesser charge interposed in this case on June 16, 1969, before Mr. Justice Charles Marks. At the time of plea, contrary to uniform procedure and practice, the Court did *not* inquire of Santobello, as to whether any promises or threats had been made to him. cf: *People* v. *Serrano*, 15 N.Y. 2d 304. The sentencing, however, came on before a different judge, namely, Mr. Justice Abraham Gellinoff (Justice Marks having retired in the interim), on the

12th of January, 1970, at which time the District Attorney, through a different Assistant District Attorney, namely, Mr. Seymour Rotker, recommended the maximum penalty provided by law (A-42—A-45*).

The District Attorney at the time of sentence was not the least bit interested in what the probation report said (A-43) but intoned a harangue based upon hearsay which culminated in the following:

> "Your Honor, there is nothing that commends him for the Court's consideration. The People would ask that the Court deal stringently and harshly with this defendant, by imposing a maximum sentence that the law can impose in such a case."

Mr. Joseph Aronstein who then represented the Defendant-Petitioner, Rudolph Santobello, informed the Court that testimony of an attorney was available to substantiate that Assistant District Attorney Greenfield had promised that no recommendation as to sentence would be made by the District Attorney at the time of sentence (A-45). The Court refused to allow a withdrawal of the plea.

It should be noted again at this juncture that with commendable candor, the District Attorney has acknowledged that Assistant District Attorney Greenfield did in fact make such a promise.

In the District Attorney's Brief to the Appellate Division of the Supreme Court, Point I thereof (page 7) stated:

> "After reading defendant's brief, the undersigned looked into the matter and *we ascertained that*

---

* (Numerals in parenthesis refer to pages of the Appellant's Appendix in the Court below unless otherwise indicated).

Assistant District Attorney Greenfield had in fact stated to defense attorney Fruchtman before Santobello entered a guilty plea that the District Attorney's Office would remain silent at the sentencing of the defendant.''

At the time of sentence Petitioner's then attorney advised the Court that, in essence, the substance of the promise made by Mr. Greenfield influenced the plea of guilty.

As a matter of fact there cannot possibly be any doubt since this Court has in its possession already the response to the bail application in this matter wherein the District Attorney has again acknowledged that the promise was made and broken.*

It is incidental to the proceeding herein that the Petitioner also sought relief by way of suppression of evidence and so forth since the only argument advanced herein is that a false promise was made by the District Attorney which induced a plea of guilty and since that actually is conceded to have occurred, the withdrawal of the plea of guilty is the only remedy which can rectify the wrong perpetrated.

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* See response of Respondent, herein, to application for bail pending certiorari, page 2, wherein the District Attorney again acknowledged the fact of the broken promise.

POINT I

The Respondent, the District Attorney of Bronx County, most commendably acknowledges that an Assistant District Attorney promised, at the time of the plea of guilty, that no recommendation as to sentence would be made, and further admits that another Assistant District Attorney broke that promise at the time of sentence by recommending the imposition of the maximum penalty under law, which recommendation the Court accepted since it actually did impose the severest penalty allowed by the law. The only remedy to rectify this injustice which violates due process of law, is to direct that the Petitioner be permitted to withdraw his plea of guilty.

Although we have already stated in an earlier portion of this brief that there is no dispute as to the facts, we again reiterate that neither party hereto disputes the events which occurred at the time of the plea of guilty, namely that Assistant District Attorney Greenfield promised that no recommendation as to sentence would be made, and that at the time of sentence, Assistant District Attorney Rotker, contrary to that promise, recommended the maximum penalty allowed by the law. That recommendation was apparently enough despite the protestations of the sentencing judge to the contrary, since Santobello was given the maximum penalty allowed by statute, one year imprisonment.

It must be borne in mind that the issue here is not whether or not the sentencing Court was justified in imposing a one year term of imprisonment, but rather whether the plea of guilty was obtained by virtue of a misrepresentation. The District Attorney concedes that the promise made at the time of the plea was not kept.

Thus, irrespective of what sentence was imposed, due process of law requires that Defendant-Petitioner be permitted to withdraw his plea of guilty.

In *Brady* v. *United States,* 397 U.S. 742 at page 755, this Court explained the standard of voluntariness which must be applied stating the following:

> "The standard as to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Court of Appeals for the Fifth Circuit:
>
> "'[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand *unless* induced by threats (or promises to discontinue improper harassment), *misrepresentation (including unfulfilled or unfulfillable promises),* or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e. g. bribes).' 242 F. 2d at page 115." (Emphasis ours)

See also *North Carolina* v. *Alford,* 400 U.S. 25. In *Alford,* this Court explained (400 U.S. at 31, 32):

> "*Jackson* [*United States* v. *Jackson,* 390 U.S. 570, 88 S. Ct. 1209] established no new test for determining the validity of guilty pleas. The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. See *Boykin* v. *Alabama,* 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969); *Machibroda* v. *United States,* 368 U.S. 487, 493, 82 S.Ct. 510, 513, 7 L.Ed.2d 473 (1962); *Kercheval* v. *United States,* 274 U.S. 220, 223, 47 S.Ct. 582, 583, 71 L.Ed. 1009 (1927)."

In *Brady,* this Court properly analogized the situation of a guilty plea to a judicial "confession". It noted that any confession which is obtained by a direct or implied promise, however slight, which is not fulfilled is involuntary. Thus, the opinion of this Tribunal explained (397 U.S. at 753):

> "*Bram* v. *United States,* 168 U. S. 532 (1897), held that the admissibility of a confession depended upon whether it was compelled within the meaning of the Fifth Amendment. To be admissible, a confession must be " 'free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any *direct or implied promises, however slight,* nor by the exertion of any improper influence.' " 168 U. S., at 542-543. More recently, *Malloy* v. *Hogan,* 378 U. S. 1 (1964), carried forward the *Bram* definition of compulsion in the course of holding applicable to the States the Fifth Amendment privilege against compelled self incrimination." (emphasis ours)

POINT II

It is not material whether or not the District Attorney believes the sentence was fair since the only issue material to this petition is whether or not the promise to refrain from making any recommendations was kept. By its own admission the Respondent broke this promise.

In *Ker* v. *California,* 374 U.S. 23, this Court noted that "fundamental fairness" is essential to preserve the due process rights of every citizen whether being tried in a state or federal forum.

In the case at bar, the District Attorney has conceded, as we have noted *supra,* that Assistant District Attorney Greenfield at the time of plea of guilty promised not to make any recommendation at the time of sentence but when sentence was pronounced, it was preceded by a lengthy harangue by Assistant District Attorney Rotker asking for the maximum punishment provided by law.

The Respondent will perhaps again take the position, as it did in the Court below, that there is no evidence in the record itself that Assistant District Attorney Rotker had been informed of the promise prior to the time that he recommended the severest sentence.

Upon analysis, however, this argument is a "house of cards" because there is no doubt that a motion to withdraw the plea of guilty was made, and since the District Attorney's Office now acknowledges that one of its assistants did articulate the promise, the only fair thing to do, and the only action consistent with due process of law, would be to consent to permit Petitioner to withdraw his plea of guilty. It would be a sad commentary indeed if a defendant was required to notify every member of the District Attorney's staff before he could rely upon a representation of one of the Assistant District Attorneys.

The mere articulation of such a premise reveals its absurdity. Mr. Greenfield was acting for the respondent.

The issue herein is not whether the sentence was fair or unfair and any attempt to distract this Court with an argument along those lines is palpably an effort to throw "dust" in this Tribunal's eyes. If the sentence had only been one day in prison, there would still be a basis for the relief requested once the acknowledgement that the promise had been made and broken was declared.

It is interesting to note that Santobello would face a substantially stiffer sentence if permitted to go to trial on the original charges herein should a conviction eventuate. The Petitioner is willing to take that risk.

In the Court below, the District Attorney noted that Petioner did not specifically declare that he was "innocent" of the charges in the original indictment. The actions of the Petitioner, however, in seeking to dismiss the indictment; in seeking to suppress evidence; and in seeking to withdraw his plea of guilty, are certainly sufficient circumstantial evidence of the fact that Petitioner is declaring his innocence. In this petition, Petitioner now declares that he is not legally guilty of any of the charges set forth in the indictment.

Because of the foregoing reasons and the commendably frank acknowledgement of the District Attorney that a promise to refrain from recommending any sentence was made and broken, the petition for certiorari should be granted and ultimately Petitioner should be given the right to withdraw his plea of guilty and go to trial.

CONCLUSION

The petition for certiorari should be granted and Petitioner should be permitted to withdraw his plea of guilty and stand trial.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

APPENDIX

Judgment of Affirmance of Appellate Division, First Judicial Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 1st day of December, 1970

Present—

HON. SAMUEL W. EAGER,
Justice Presiding,

" LOUIS J. CAPOZZOLI,
" OWEN MCGIVERN,
" ARON STEUER,
" GEORGE TILZER,
Justices.

2884

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

—against—

RUDOLPH SANTOBELLO,
Defendant-Appellant

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, Bronx County (Gellinoff, J.), rendered on January 9, 1970, convicting him of the crime of Possession of Gambling Records in the Second Degree [Penal Law §225.15]; and defendant-appellant having also brought up for review an order of said Court denying a hearing upon a motion to suppress

evidence, an order denying a hearing on a motion for an inspection of the minutes of the grand jury, and an Order denying the motion to withdraw the plea of guilty entered on June 16, 1969; and said appeal having been argued by Mr. Irving Anolik, of counsel for the appellant, and by Mr. Daniel J. Sullivan, of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment and orders so appealed from be and the same are hereby, in all things, affirmed.

ENTER:

HYMAN W. GAMSO
Clerk

Certificate Denying Leave to Appeal to Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

Before:

HON. ADRIAN P. BURKE,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent

—against—

RUDOLPH SANTOBELLO,
Defendant-Appellant

I, ADRIAN P. BURKE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to §520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York City, New York
February 4th, 1971

/s/ ADRIAN P. BURKE
Associate Judge

IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1480~~ 70-98

RUDOLPH SANTOBELLO,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BURTON B. ROBERTS
District Attorney
Bronx County
Attorney for Respondent
851 Grand Concourse
Bronx, New York 10451
588-9500

DANIEL J. SULLIVAN
Assistant District Attorney
Of Counsel

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RUDOLPH SANTOBELLO,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

This is a petition for a writ of certiorari to review an order of the Supreme Court of the State of New York, Appellate Division, First Department, entered December 1, 1970, unanimously affirming, without opinion [35 A.D. 2d 1084], a judgment of the Supreme Court of the State of New York, County of Bronx, convicting the petitioner, following a plea of guilty, of the crime of Possession of Gambling Records in the Second Degree [New York Penal Law, §225.15], and sentencing him to one-year's imprisonment in the New York City Correctional Institution for

Men (A48)*. Leave to appeal to the New York Court of Appeals was denied (Burke, J.) on February 4, 1971. Petitioner is free on bail pending determination of the instant petition, pursuant to an order of Mr. Justice Harlan of this Court signed on February 16, 1971.

Question Presented

Did the circumstances attendant upon the petitioner's entry of a guilty plea and upon the subsequent sentence proceeding deprived him of due process of law?

Statement of the Case

The petitioner Rudolph Santobello was indicted (3024/68) on November 13, 1968, for the crimes of Promoting Gambling in the First Degree [New York Penal Law, §225.10] and Possession of Gambling Records in the First Degree [*id.*, §225.20] on the affidavit of Patrolman Frank Serpico who averred that he had removed policy slips containing approximately 840 plays and other slips representing controller's records from the petitioner's person and automobile (A9-10).

The petitioner initially pleaded not guilty but he changed his plea to guilty of second degree possession of gambling records, a Class A Misdemeanor, on June 16, 1969 (A26). The assistant district attorney stated the facts as being that, on November 13, 1968, the petitioner knowingly possessed slips of mutuel race horse policy rep-

* Unless otherwise indicated, references are to pages of Defendant-Appellant's Appendix on appeal to the Supreme Court of the State of New York, Appellate Division, First Department.

resenting more than 500 plays, and recommended acceptance of the plea to cover the entire indictment (A27-8). Before taking the plea, Justice Marks ascertained that the petitioner had heard the plea offered by his attorney, that the petitioner knew what he was pleading to, and that the petitioner was entering the plea of his own free will (A28-9). When asked by the Court, the petitioner also admitted that the facts as stated by the assistant district attorney were true and correct (A29).

We pause momentarily to note that various motions were made in this case after the guilty plea had been entered and prior to the imposition of sentence. By motion returnable on June 17, 1969, supported by the affidavit of the petitioner herein sworn to April 19, 1969, the defense moved to suppress tangible evidence and oral statements obtained as a result of an allegedly unconstitutional search and seizure. On June 30, 1969, Justice Marks permitted the motion aforesaid to be withdrawn in open court.

Returnable on October 8, 1969, were two additional motions, supported by sworn affidavits of the petitioner Santobello. One was a motion to suppress any evidence secured by the prosecution as a consequence of an allegedly illegal search in violation of the petitioner's Fourth and Fifth Amendment rights, and in the petitioner's affidavit he asserted that no previous application had been made for the relief prayed for (A21-3). The second motion was one for inspection of the grand jury minutes and for an order dismissing the indictment. Our understanding is that both the motions aforesaid were "marked off" the calendar on Dec. 15, 1969. More specifically, the trial court's daily calendar indicates that the suppression motion was marked

off on that date in Justice Ross' Part. Furthermore, a pencil notation on the front of the notice of motions for inspection-dismissal indicates that these motions were similarly disposed of on that day.

Seemingly by motion also returnable on October 8th, the petitioner Santobello sought to withdraw his previously entered plea of guilty (A11-8). In his supporting affidavit, Santobello averred, *inter alia*, "* * * that before and at the time a plea of guilty was entered, deponent did not know that he had the right to move to suppress any evidence secured by the police as aforesaid" (A14). Additionally, the petitioner asserted that no previous application had been made for the relief being sought (A15). The prayer for relief sought not only permission to withdraw the plea, but also to make all necessary motions—apparently the suppression and inspection-dismissal motions returnable that day (*ibid.*).

In his affirmation in opposition to the motion under discussion, the assistant district attorney in charge of the case asserted that the movant had not set forth any reason warranting the relief prayed for, and he went on to request that, in the event that the Court were not disposed to deny the motion outright, a hearing be held to determine the factual issues (A24-25).

Our examination of the pertinent daily court calendar disclosed that the aforesaid motion to withdraw the plea was denied by Justice Marks on November 26, 1969, at which time he adjourned the sentencing until January 9, 1970.

On the adjourned date, the petitioner appeared before Justice Gellinoff for sentence (A30). At that time, counsel for Santobello remarked that, due to what he believed to have been an error, the second motion to suppress evidence and the motions for inspection-dismissal had been "marked off" the calendar, and he asked to have "number one" revitalized—seemingly the second suppression motion in view of the type legal argument advanced by the attorney in question (A31-8). Justice Gellinoff held that, by the taking of the plea, the motions were deemed to be abandoned, and that jurist added that they could be renewed by counsel in the proper manner, but he also indicated that no adjournment of the sentencing would be granted for that purpose (A37) [see *People* v. *Maldonado*, 27 N.Y.2d 667 (1970); *cf. Kaufman* v. *United States*, 394 U.S. 217 (1968)].

Before sentence was pronounced, defense counsel also made an unsuccessful argument to the effect that, in taking a plea, Justice Marks failed to interrogate Santobello fully about the significance of his act, citing the case of *McCarthy* v. *United States*, 394 U.S. 459 (1969) (A38-40). But, the incident aforesaid is not, as such, made a subject matter of this application.

Thereafter, the Executive Assistant District Attorney recommended a maximum sentence on the basis of the petitioner's criminal proclivities—including his 1951 conviction and life sentence for the murder of a police officer; his criminal activities after his release on parole; his alleged extensive links with organized crime; and his apparent wealth, the source of which was not apparent (A43-46). Counsel for the defense then stated the following:

> "Mr. Aronstein: Mr. Fruchtman, the lawyer who was present, and was this defendant's attorney, at the

time of the plea, told me, and told me that he will testify under oath, that at the time he took the plea, Mr. Greenfield, the Assistant District Attorney told him that the District Attorney will not make any recommendations, with respect to the sentence. And I therefore, ask that at this time this Court adjourn this sentence for a short period of time. I'll produce Mr. Fruchtman, and—in court, and have him testify in open court, as to what—

"Now if what Mr. Fruchtman says is true, then the plea was obtained by fraud and deception, by the District Attorney, if it was obtained on the expressed promise that the District Attorney would make no recommendation" (A45-46).

Justice Gellinoff replied that there was no need to adjourn the sentence or have any testimony because he would not be influenced by what the District Attorney said (A46). He then quoted from the petitioner's probation report as follows:

" 'He is unamenable to supervision in the community. He is a professional criminal * * * and a recidivist. Institutionalization * * * is the only means of halting his anti-social activities' " (A47).

The one-year maximum sentence was then imposed (A48).

Summary of Argument

The instant case involves state court decisions rendered upon a singular fact situation, and it does not present a substantial federal question for review by this tribunal.

ARGUMENT

To demonstrate the absence of a substantial federal question, we deem it worthwhile to quote the following relevant portion of respondent's brief in the state appellate courts:

> "Prefatorily, we wish to make a concession in connection with the instant discussion. After reading defendant's brief, the undersigned looked into the matter and we ascertained that Assistant District Attorney Greenfield had in fact stated to defense attorney Fruchtman before Santobello entered a guilty plea that the District Attorney's Office would remain silent at the sentencing of the defendant. The record, however, is silent as to whether or not that promise was communicated to Santobello. It is equally silent on the subject of whether Executive Assistant District Attorney Rotker was aware of Mr. Greenfield's representation—a question we will not now presume to answer because anything we say would be *dehors* the record. In that connection, it is noteworthy that Mr. Greenfield alone appeared for the prosecution at the time the plea was taken, and that Mr. Rotker alone appeared on behalf of the People at the time of sentence.
>
> We now turn to an analysis of the situation in the light of our concession. That is to say, our argument will pre-suppose that a promise not to comment at sentence had been made to Santobello and that it was ultimately broken by the prosecution.
>
> To begin with, we have some difficulty in categorizing the incident below. We note, for one thing, that there is a tendency to permit withdrawal of a guilty plea or to order a hearing where a defendant asserts his innocence prior to the actual imposition of sentence [see, *e.g.*, *People* v. *McKennion*, 27 N.Y. 2d 671 (1970)]. But the line of cases typified by that most recent ex-

pression of judicial attitudes by our State's highest tribunal is seemingly inapposite, for nowhere in this case was there a claim by Santobello either that he was innocent or that he did not comprehend the nature of his plea. While he does suggest (brief, p. 8) that he had a valid basis to suppress the tangible evidence seized from him on Fourth Amendment grounds, the entry of the plea of guilty appears to render that possibility innocuous for present purposes [*People* v. *Maldonado*, 27 N.Y. 2d 667 (1970); *cf. Kaufman* v. *United States*, 394 U.S. 217 (1968)].

Actually, the type grievance being urged upon this tribunal generally sounds in *coram nobis* law. Had this case also involved an element of coercion in inducing the plea, we would be constrained further to concede that the entire judgment should be vacated, but the critical element aforesaid is not present herein [*People* v. *Farina*, 2 N.Y. 2d 454 (1957)]. As a matter of fact, a disinclination to follow *Farina* is to be detected from subsequent opinions wherein the device employed has been to resentence the defendant—or to modify the sentence in the case of an appellate court—where there has been a broken promise by a prosecutor [see *People* v. *Hernandez*, 29 A.D. 2d 865 (2d Dept. 1968); *People* v. *Brooks*, 18 A.D. 2d 710 (2d Dept. 1962)]. While it is obviously impossible literally to now live up to the promise not to comment at sentencing made by the prosecutor, the pragmatic-type of approach taken in the cases last cited may be employed here without doing violence to the concept of due process.

That result, we submit, may be achieved by viewing Justice Gellinoff's colloquy with the defense attorney at the pertinent time as the functional equivalent of the type hearing now being requested by Santobello. Hence, the jurist in question was apprised of the possibility that the prosecution had promised to refrain

from asking that a prison term be imposed upon the defendant. Whereupon, that jurist indicated that such silence would not have influenced him, and that he was imposing the sentence solely on the basis of what was shown by the probation report. Needless to say, if there had been no promise made to the defendant Santobello, he still would have had to take his chances with the sentencing judge respecting the imposition of a prison term. Conversely, even if the prosecutor had remained taciturn, the sentencing justice would have possessed the power to impose the clearly legal sentence that Santobello did actually receive.

In sum, the absence of a claim of innocence or misunderstanding by the defendant Santobello, and Justice Gellinoff's disclaimer of being in any way influenced by the prosecutor's attitude, taken together, constitute a legally sufficient basis for concluding that due process notions did not require a vacatur of the plea.

Nothing in the remaining authorities cited by the defendant militates against what we have thus far said. One of those cases amounts simply to a statement that the record evidence did not conclusively refute the allegations in the *coram nobis* petition which bore on an entirely different subject from that involved in this case [see *People* v. *Randolph*, 25 N.Y. 2d 765 (1969)]. All five of the remaining cases cited by Santobello involved more than a promise of leniency, and they are further distinguishable on the ground that, unlike the facts here, the truth of the factual assertions was unknown to the reviewing court, with the result that hearings had to be mandated [see *People* v. *Bagley*, 23 N.Y. 2d 814 (1969); *People* v. *Granello*, 18 N.Y. 2d 823 (1966); *People* v. *Weldon*, 17 N.Y. 2d 814 (1966); *People* v. *Picciotti*, 4 N.Y. 2d 340 (1958); *People* v. *Forlano*, 19 A.D. 2d 365 (1st Dept. 1963)]. Contrariwise, we are now involved with a single issue, the truth of defendant's underlying postulate having been conceded

by us, and the lower court having for all practical purposes held a hearing upon that issue, leaves open only the propriety of its determination.

Before closing this Point, we wish to make some additional comments. To begin with, the United States Supreme Court in *Brady* v. *United States*, 90 S. Ct. 1463 at 1468 (1970), held that 'Central to the plea [of guilty] and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged. * * *' Defendant now tries to escape the pressing force of this statement by claiming that footnote 8 in the *Brady* case renders the aforementioned principle inapplicable to the instant facts. Defendant's distinction, however, is invalid for at least two reasons. First, the context of the footnote refers to prosecutors who threaten charges not justified by the evidence. No such claim is made here, nor would it find any support in the record. For in fact, Santobello pleaded guilty to a lesser offense than that charged in the indictment. Furthermore, no claim of coercion was raised by the defendant at any time during these proceedings.

With reference to the implication in defendant's brief (p. 10) that Executive Assistant District Attorney Rotker requested a hearing on the 'promise' issue, we feel constrained to clarify the facts. Mr. Rotker's so-called request (A25) was made in connection with an earlier motion to withdraw the plea wherein the defendant claimed an earlier lack of knowledge that he could move to suppress certain tangible evidence and oral statements. Furthermore, this 'request' was made alternatively in the event that the principal remedy sought by the People, a denial of the motion, was not granted.

At this point we feel obliged to note an interesting aspect of the motion practice engaged in by Santobello. By motion returnable on June 17, 1969, and supported by the defendant's affidavit sworn to April 19, 1969, the

> defense moved to suppress certain tangible and oral evidence. On October 8, 1969, defendant tried to withdraw his previously entered plea of guilty and in his sworn affidavit in support thereof he stated, *inter alia,* 'that before and at the time a plea of guilty was entered [*i.e.* June 16, 1969], deponent did not know that he had the right to move to suppress any evidence secured by the police as aforesaid'.
>
> We feel that defendant's allegation—that he was unaware of his right to move to suppress albeit he had in fact made such a motion less than four months before—raises very serious doubts as to the good faith of his present claim. For it tends to suggest, as we see it, that he has been less than candid with the Court below and has concerned himself solely with efforts to avoid imposition of a prison term as distinguished from attempts to establish his innocence. Perforce, any claim in this case by the defendant must be carefully scrutinized."

By the foregoing recitation of the facts and respondent's argument in the state courts, we have attempted to establish a foundation for our conclusion—that no substantial federal question is presented by the present case.

To begin with, the constitutional prerequisites for accepting a plea of guilty were met here, with the result that the petitioner implicitly concedes that he knowingly and intentionally pleaded guilty at a time when he was represented by counsel [see, *e.g., North Carolina* v. *Alford,* 400 U.S. 25, 91 S. Ct. 160 (1970); *Brady* v. *United States,* 397 U.S. 742, 90 S. Ct. 1463 (1970)]. As petitioner Santobello would have it, however, the fact that a prosecutorial promise to him was broken makes his situation exceptional. But, the voluntariness of a plea must be considered in the light

of all relevant circumstances, and even the failure by the prosecution to honor a sentence promise does not, *per se,* deprive a plea of its voluntary character [*United States* v. *Malcolm,* 432 F. 2d 809, 814 (2d Cir. 1970)]. On this record, Santobello's plea may not properly be viewed as involuntary.

Noteworthy, initially, is the fact that New York State virtually mandates the granting of any application made prior to sentence seeking permission to withdraw a plea of guilty on the grounds of innocence [see *People* v. *McKennion,* 27 N.Y. 2d 671 (1970)]. Here, of course, no such claim has ever been voiced by the petitioner, the gratuitous remarks in his brief notwithstanding. Indeed, there has never been an assertion by the petitioner, himself, to the effect that he had pleaded in reliance upon the relevant representation, the plaint along those lines having at all times herein been voiced in the argumentation of his various attorneys.

Moreover, since the petitioner was represented by counsel at all times now pertinent, he was chargeable with knowledge that taciturnity on the prosecution's part was not an ironclad guarantee that he would escape the imposition of a prison sentence. Beyond that, he had to have known, as a practical matter, that his prior criminal record greatly enhanced the chances of incarceration.

Additionally, the record impels the conclusion that the petitioner was concerned solely with avoiding a jail sentence, as witness the motion practice in which he engaged. Since no judge was privy to the understanding between the petitioner and the prosecution, Santobello presumably

pleaded before a jurist he considered to be lenient, but as it happened that jurist retired before the date of sentencing.

At the sentencing proceeding, however, Justice Gellinoff was apprised of the pertinent understanding—an agreement of which he would have been unaware if it had been honored. In our view, the imparting of that information, however inadvertently, made the defendant whole, for the promise was not of a kind which could have been enforced by judicial action [see, *e.g., People* v. *Hernandez,* 29 A.D. 2d 865 (2d Dept. 1968); *People* v. *Brooks,* 18 A.D. 2d 710 (2d Dept. 1962)]. Given all the circumstances already mentioned, Justice Gellinoff certainly was not required, *sua sponte,* to offer the petitioner an opportunity to withdraw his guilty plea. The possibility that that jurist would not be swayed either by the comments or the silence of the prosecution was a foreseeable risk from the petitioner's perspective, and the fact that his calculations went awry does not entitle Santobello now to attack the voluntariness of his plea.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

BURTON B. ROBERTS
District Attorney
Bronx County
Attorney for Respondent

DANIEL J. SULLIVAN
Assistant District Attorney
Of Counsel

April, 1971

In The

Supreme Court of the United States

October Term, 1970

No. ~~1480~~ 70-98

RUDOLPH SANTOBELLO,

Petitioner,

- against -

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department.
Petition for Certiorari filed March 18, 1971
Certiorari granted May 29, 1971

BRIEF FOR PETITIONER

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Supreme Court of the United States

October Term, 1970

No. 1480

RUDOLPH SANTOBELLO,

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Petition for Certiorari filed March 18, 1971
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BRIEF FOR PETITIONER

Statement

This Brief is submitted in connection with the granting of certiorari in this case on May 29, 1971. The petitioner is seeking to obtain a reversal and vacation of the judgment of the Supreme Court of the State of New York, County of Bronx, which convicted him of the crime of possession of gambling records in the second degree (N.Y. Penal Law §225.15) upon his plea of guilty before Justice Abraham Gellinoff. The petitioner wishes to withdraw his plea of guilty and proceed to trial. Following a harangue by the Executive Assistant District Attorney asking for maximum punishment, which was contrary to an express promise made prior to the plea of guilty, the Trial Court did in fact sentence petitioner to the maximum term of incarceration permitted by law, namely one year.

Mr. Justice John Marshall Harlan of this Court, on the 16th day of February, 1971, granted petitioner bail pending the timely filing (by March 22, 1971) and disposition of the within petition for certiorari. Certiorari was granted May 29, 1971.

Opinion Below

No opinion was rendered by the Appellate Division in unanimously affirming the judgment of conviction. A copy of the decision of that Court is at page 40a of the Appendix.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1257(3). A timely application for leave to appeal to the Court of Appeals of the State of New York was made but was denied by Associate Judge Adrian P. Burke in a certificate dated February 4, 1971, a copy of which is reprinted at page 41a of the Appendix.

The Questions Presented for Review

1. Whether defendant-petitioner, Rudolph Santobello, was denied due process of law under the Fifth and Fourteenth Amendments of the United States Constitution when he was fraudulently induced to plead guilty upon the promise of an Assistant District Attorney that no recommendation whatsoever would be made as to sentence, but that at the time of sentence a vehement supplication was made by the District Attorney to the Court requesting maximum punishment under law, which recommendation met with complete success since the Court imposed the severest penalty allowed by the law?

2. Whether the deliberate breaking of a promise made by a District Attorney to a defendant to induce a plea of guilty may be disregarded merely because this sentencing judge alleged that he was not influenced by the vehement recommendations for maximum sentence but proclaimed that he would have imposed the maximum sentence anyway? (North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160; Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463 (1970).

3. Whether the fact that a Public Prosecutor has induced a defendant to plead guilty by a false promise to withhold any recommendation as to sentence, ipso facto, requires vacating of the plea of guilty and a return of the defendant to his status quo ante?

The Prosecutor herein has conceded throughout that the promise to withhold recommendation as to sentence was indeed given and was in fact broken so there is no dispute about this issue upon this petition.

The Constitutional and Statutory Provisions Involved

The Fifth and Fourteenth Amendments of the United States Constitution are involved herein as is New York Penal Law §225.15.

Statement of the Case

The statement of the case herein is going to be very brief because there is no issue of fact raised upon this brief. Even in the papers submitted to this Court in opposition to petitioner's application for bail, the District Attorney of Bronx County, representing the respondent herein, has conceded that the promise to withhold recommendation as to sentence at the time the defendant-petitioner, Rudolph Santobello, pleaded guilty was actually made and at the time of sentence that promise was clearly broken.

The petitioner herein was originally indicted for two felonies, namely promoting gambling in the first degree and possession of gambling records in the first degree. After a bargain was struck between his then attorney and an Assistant District Attorney (Mr. Greenfield), the defendant-petitioner was assured by Assistant District Attorney Greenfield, acting on behalf of the District Attorney's Office, that no recommendation as to sentence would be made if Santobello bargained away his rights by pleading guilty to the lesser charge of possession of gambling records in the second degree, a misdemeanor.

Only after this representation had been made was the plea of guilty to the lesser charge interposed in this case on June 16, 1969, before Mr. Justice Charles Marks. At the time of plea, contrary to uniform procedure and practice, the Court did not inquire of Santobello, as to whether any promises or threats had been made to him. cf: People v. Serrano, 15 N.Y. 2d 304, 258 N.Y.S. 2d 386. The sentencing, however, came on before a different judge, namely, Mr. Justice Abraham Gelinoff (Justice Marks having retired in the interim), on the 12th of January, 1970, at which time the District Attorney, through a different Assistant District Attorney, namely Mr. Seymour Rotker, recommended the maximum penalty provided by law (32a-35a[1]).

---

1. Numerals in parenthesis refer to pages of the Petitioner's Appendix in this Court unless otherwise indicated.

The District Attorney at the time of sentence was not the least bit interested in what the probation report said (33a-34a) but intoned a harangue based upon hearsay which culminated in the following:

> "Your Honor, there is nothing that commends him for the Court's consideration. The People would ask that the Court deal stringently and harshly with this defendant by imposing a maximum sentence that the law can impose in such a case."

Mr. Joseph Aronstein who then represented the defendant-petitioner, Rudolph Santobello, informed the Court that testimony of an attorney was available to substantiate that Assistant District Attorney Greenfield had promised that no recommendation as to sentence would be made by the District Attorney at the time of sentence (34a). The Court refused to allow a withdrawal of the plea.

It should be noted again at this juncture that with commendable candor, the District Attorney has acknowledged that Assistant District Attorney Greenfield did in fact make such a promise.

In the District Attorney's Brief to the Appellate Division of the Supreme Court, Point I thereof (page 7) stated:

> "After reading defendant's brief, the undersigned looked into the matter and <u>we ascertained that Assistant District Attorney Greenfield had in fact stated to defense</u>

attorney Fruchtman before Santobello entered a guilty plea that the District Attorney's Office would remain silent at the sentencing of the defendant."

At the time of sentence petitioner's then attorney advised the Court that, in essence, the substance of the promise made by Mr. Greenfield influenced the plea of guilty.

As a matter of fact there cannot possibly be any doubt since this Court has in its possession already the response to the bail application in this matter wherein the District Attorney has again acknowledged that the promise was made and broken.[2]

It is incidental to the proceeding herein that the petitioner also sought relief by way of suppression of evidence and so forth since the only argument advanced herein is that a false promise was made by the District Attorney which induced a plea of guilty and since that actually is conceded to have occurred, the withdrawal of the plea of guilty is the only remedy which can rectify the wrong perpetrated.

---

2. See response of respondent, herein, to application for bail pending certiorari, page 2, wherein the District Attorney again acknowledged the fact of the broken promise.

Argument

Point I

THE RESPONDENT, THE DISTRICT ATTORNEY OF BRONX COUNTY, MOST COMMENDABLY ACKNOWLEDGES THAT AN ASSISTANT DISTRICT ATTORNEY PROMISED, AT THE TIME OF THE PLEA OF GUILTY, THAT NO RECOMMENDATION AS TO SENTENCE WOULD BE MADE, AND FURTHER ADMITS THAT ANOTHER ASSISTANT DISTRICT ATTORNEY BROKE THAT PROMISE AT THE TIME OF SENTENCE BY RECOMMENDING THE IMPOSITION OF THE MAXIMUM PENALTY UNDER LAW, WHICH RECOMMENDATION THE COURT ACCEPTED SINCE IT ACTUALLY DID IMPOSE THE SEVEREST PENALTY ALLOWED BY THE LAW. THE ONLY REMEDY TO RECTIFY THIS INJUSTICE WHICH VIOLATES DUE PROCESS OF LAW, IS TO DIRECT THAT THE PETITIONER BE PERMITTED TO WITHDRAW HIS PLEA OF GUILTY.

Although we have already stated in an earlier portion of this brief that there is no dispute as to the facts, we again reiterate that neither party hereto disputes the events which occurred at the time of the plea of guilty, namely that Assistant District Attorney Greenfield promised that no recommendation as to sentence would be made, and that at the time of sentence, Assistant District Attorney Rotker, contrary to that promise recommended the maximum penalty allowed by the law. That recommendation was apparently enough despite the protestations of the sentencing judge to the contrary, since Santobello was given the maximum penalty allowed by statute, one year imprisonment.

It must be borne in mind that the issue here is not whether or not the sentencing Court was justified in imposing a one year term of imprisonment, but rather whether the plea of guilty was obtained by virtue of a misrepresentation. The District Attorney concedes that the promise made at the time of the plea was not kept. Thus, irrespective of what sentence was imposed, due process of law requires that defendant-petitioner be permitted to withdraw his plea of guilty.

In Brady v. United States, 397 U.S. 742 at page 755, 90 S.Ct. 1463 (1970), this Court explained the standard of voluntariness which must be applied stating the following:

> "The standard as to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Court of Appeals for the Fifth Circuit:
>
> '[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).' 242 F.2d at page 115." (Emphasis ours.)

See also North Carolina v. Alford, 400 U.S. 25. In Alford, this Court explained (400 U.S. at 31, 32):

> "Jackson [United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209] established no new test for determining the validity of guilty pleas. The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. See Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed. 2d 274 (1969); Machibroda v. United States, 368 U.S. 487, 493, 82 S.Ct. 510, 513, 7 L.Ed. 2d 473 (1962); Kercheval v. United States, 274 U.S. 220, 223, 47 S.Ct. 582, 583, 71 L.Ed. 1009 (1927)."

See, too, McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 1171 (1969).

In Brady, this Court properly analogized the situation of a guilty plea to a judicial "confession." It noted that any confession which is obtained by a direct or implied promise, however slight, which is not fulfilled is involuntary. Thus, the opinion of this Tribunal explained (397 U.S. at 753):

> "Bram v. United States, 168 U.S. 532 (1897), held that the admissibility of a confession depended upon whether it was compelled within the meaning of the Fifth Amendment. To be admissible, a confession must be 'free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied prom-

> ises, however slight, nor by the exertion of any improper influence.' 168 U.S. at 542-543. More recently, Malloy v. Hogan, 378 U.S. 1 (1964), carried forward the Bram definition of compulsion in the course of holding applicable to the States the Fifth Amendment privilege against compelled self incrimination." (Emphasis ours.)

Point II

IT IS NOT MATERIAL WHETHER OR NOT THE DISTRICT ATTORNEY BELIEVES THE SENTENCE WAS FAIR SINCE THE ONLY ISSUE MATERIAL TO THIS PETITION IS WHETHER OR NOT THE PROMISE TO REFRAIN FROM MAKING ANY RECOMMENDATIONS WAS KEPT. BY ITS OWN ADMISSION THE RESPONDENT BROKE THIS PROMISE.

In Ker v. California, 374 U.S. 23, 83 S.Ct. 1623 (1963), this Court noted that "fundamental fairness" is essential to preserve the due process rights of every citizen whether being tried in a state or federal forum.

In the case at bar, the District Attorney has conceded, as we have noted supra, that Assistant District Attorney Greenfield at the time of plea of guilty promised not to make any recommendation at the time of sentence but when sentence was pronounced, it was preceded by a lengthy harangue by Assistant District Attorney Rotker asking for the maximum punishment provided by law.

The respondent will perhaps again take the position, as it did in the Court below, that there is no evidence in the record itself that Assistant District Attorney Rotker had been informed of the promise prior to the time that he recommended the severest sentence.

Upon analysis, however, this argument is a "house of cards" because there is no doubt that a motion to withdraw the plea of guilty was made, and since the District Attorney's Office now acknowledges that one of its assistants did articulate the promise, the only fair thing to do, and the only action consistent with due process of law, would be to consent to permit petitioner to withdraw his plea of guilty. It would be a sad commentary indeed if a defendant was required to notify every member of the District Attorney's staff before he could rely upon a representation of one of the Assistant District Attorneys.

The mere articulation of such a premise reveals its absurdity. Mr. Greenfield was acting for the respondent.

The issue herein is not whether the sentence was fair or unfair and any attempt to distract this Court with an argument along those lines is palpably an effort to throw "dust" in this Tribunal's eyes. If the sentence had only been one day in prison, there would still be a basis for the relief requested once the acknowledgement that the promise had been made and broken was declared.

It is interesting to note that Santobello would face a substantially stiffer sentence if permitted

to go to trial on the original charges herein should a conviction eventuate. The petitioner is willing to take that risk.

In the Court below, the District Attorney noted that Petitioner did not specifically declare that he was "innocent" of the charges in the original indictment. The actions of the petitioner, however, in seeking to dismiss the indictment; in seeking to suppress evidence; and in seeking to withdraw his plea of guilty, are certainly sufficient circumstantial evidence of the fact that petitioner is declaring his innocence. In this brief, petitioner now declares that he is not legally guilty of any of the charges set forth in the indictment.

Because of the foregoing reasons and the commendably frank acknowledgements of the District Attorney that a promise to refrain from recommending any sentence was made and broken, the judgment of conviction should be vacated and petitioner should be given the right to withdraw his plea of guilty and go to trial.

Conclusion

The conviction should be vacated and petitioner should be permitted to withdraw his plea of guilty and stand trial.

Respectfully submitted,

IRVING ANOLIK

Attorney for Petitioner

APPENDIX

New York State Penal Law

§ 225.15 Possession of Gambling Records in the Second Degree

A person is guilty of possession of gambling records in the second degree when, with knowledge of the contents thereof, he possesses any writing, paper, instrument or article:

1. Of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise; or

2. Of a kind commonly used in the operation, promotion or playing of a lottery or policy scheme or enterprise; except that in any prosecution under this subdivision, it is a defense that the writing, paper, instrument or article possessed by the defendant constituted, reflected or represented plays, bets or chances of the defendant himself in a number not exceeding ten.

Possession of gambling records in the second degree is a class A misdemeanor. L. 1965, c. 1030, eff. Sept. 1, 1967.

IN THE

Supreme Court of the United States

October Term, 1970

~~No. 1480~~
(Now No. 70-98)

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

RUDOLPH SANTOBELLO,
Petitioner.

On Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department.
Petition for Certiorari Filed March 18, 1971
Certiorari Granted May 29, 1971

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

Question Presented

On the totality of circumstances was the petitioner's constitutional right to due process of law abridged by the prosecution's failure literally to comply with its promise to refrain from asking for imposition of a prison term at the time of sentence?

Statement of the Case

On November 13, 1968, the petitioner, Rudolph Santobello, was arrested by a Patrolman Serpico for the alleged possession in Bronx County on that day of 840 "plays" (*i.e.*, bets) of what is termed "mutuel race horse policy" and of certain "controller's" records of gambling transactions (14a).* On November 13, 1968, a grand jury indicted the petitioner for the felonies of Promoting Gambling in the First Degree [N. Y. Penal Law, §225.10] and Possession of Gambling Records in the First Degree [*id.*, §225.20]. A plea of not guilty was entered by petitioner Santobello on January 27, 1969, in the Supreme Court of the State of New York, County of Bronx.

By motion returnable on June 17, 1969, supported by the affidavit of the petitioner herein sworn to April 19, 1969, the defense moved to suppress tangible evidence and oral statements obtained from an allegedly unconstitutional search and seizure (43a-6a).

Prior to the return date of the motion mentioned in the preceding paragraph, and more specifically on June 16, 1969, Santobello entered a plea of guilty before Justice Charles Marks to the crime of Possession of Gambling Records in the Second Degree, a Class A misdemeanor punishable by a maximum term of one year in prison (18a-20a). At that proceeding the petitioner was represented by an attorney named Max Fruchtman and the prosecution was represented by Assistant District Attorney David Greenfield (who has since resigned), but the record also indicates that the then Executive (now Chief) Assistant District Attorney Seymour Rotker was "standing by"

* Unless otherwise noted, references are to pages of the consecutively numbered Appendix and Supplemental Appendix filed in this Court by the petitioner and the respondent, respectively.

(18a). The application to change the plea was voiced by Mr. Fruchtman and Assistant District Attorney Greenfield, who thereafter recommended that the Court accept the plea, pointing out that the facts of the case were that the petitioner had possessed more than 500 policy bets at the time and place already mentioned (18a-9a). Whereupon, Justice Marks elicited from Santobello an acknowledgment that the facts as set out by the prosecutor were true and correct, and that the petitioner was pleading guilty of his own free will (19a-20a). Thereafter, the presiding jurist set June 30th for sentence, and he ordered that a probation report be prepared in the interim (20a).

On June 17th, the Executive Assistant District Attorney appeared before Justice Marks and requested that, because of the absence of defense counsel, the pending motion to suppress be put over until the date of sentence so that the defense could withdraw it at that time as moot (53a-4a). On June 30, 1969, Mr. Fruchtman did withdraw the suppression motion, but Justice Marks declined to impose sentence on that day because he did not have the necessary "papers" (55a-6a). While the justice stated (56a) that the adjournment would be until "Wednesday," our search of the records disclosed no further proceedings until September, 1969.

On the 16th of that month, the case was on before Justice Marks, who advised Mr. Fruchtman, without any recorded preliminaries, that the matter was being adjourned for one week "[i]n view of the Probation Report * * *" (57a-8a).

On September 23rd, Mr. Fruchtman was replaced as defense counsel by Joseph Aronstein, Esq., who stated that he had prepared two motions and that he contemplated

making a third (59a-60a). Mr. Aronstein went on to assert that he had left the return date on the motions blank because, in essence, he did not know when Justice Marks would be sitting in the Bronx again (60a). Incidentally, in that connection, it may be observed that the First Judicial District in New York State consists of New York and Bronx Counties and—for informational purposes although dehors the record—that Justice Marks was assigned only occasionally to the Bronx and present therein during much of the time now relevant because he was conducting a post-conviction hearing pursuant to an order of an appellate court. In any event, Justice Marks informed Mr. Aronstein on the occasion under discussion that motions should be noticed for October 8, 1969 (61a).

In all, three motions were returnable on that date. One was a motion to withdraw the plea of guilty (5a-10a) and, in his supporting affidavit, the petitioner Santobello averred, *inter alia,* "* * * that before and at the time a plea of guilty was entered deponent did not know that he had the right to move to suppress any evidence secured by the police as aforesaid" (7a). In his affirmation in opposition to that motion, Executive Assistant District Attorney Rotker asserted that the movant had not set forth any reason warranting the relief prayed for, and he went on to request that, in the event that the Court were not disposed to deny the motion outright, a hearing be held to determine the factual issues (15a-6a).

The second motion returnable on October 8th was one to suppress any evidence secured by the prosecution as a consequence of an allegedly illegal search in violation of the petitioner's Fourth and Fifth Amendment rights, and Santobello, in his supporting affidavit, asserted that no

previous application had been made for the relief prayed (11a-3a). The third motion noticed for October 8th was one to inspect the grand jury minutes or, in the alternative, to dismiss the indictment (48a-52a).

On October 8th, Messrs. Rotker and Greenfield were present in the courtroom in which Justice Marks was presiding (63a-6a). Mr. Rotker requested that a hearing be held on the motion to withdraw the plea of guilty, announcing his intention to call the first defense attorney, Mr. Fruchtman, as a witness on the factual issues raised by the petitioner's affidavit, including the assertion therein that "* * * he was unaware of certain constitutional rights * * *" (*ibid.*). Whereupon, the Court set October 23rd for a hearing, the adjourned date already agreed on for the two other motions (*ibid.*).

On the adjourned date, Justice Marks stated that he saw no need for a hearing, and he again adjourned the case until October 29th, upon which day there was a further postponement because the prosecution's brief had not been received by the Court (67a-71a).

On November 26, 1969, Justice Marks denied the petitioner's motion to withdraw the plea of guilty, ordering defense counsel to submit an appropriate order, and that jurist also fixed a date for sentence, January 9, 1970—a date which, incidentally, proved to be subsequent to his own retirement from the bench (72a-3a). No appearance by a prosecutor on that day (*i.e.*, November 26th) is reflected by the record, and the Court's decision on the motion was never recorded in its motion book (76a-7a). The original moving papers, including petitioner's affidavit wherein he swore that he had been unaware of the right to make a suppression motion albeit he had already made one in this

case, are missing from the files of the Supreme Court, Bronx County (*ibid.*). The Clerk of Bronx County has certified to this tribunal his inability to locate those documents after several searches, one of which was carried out at the behest of the Bronx District Attorney's Office in January, 1970 (76a-7a).

The other two motions originally returnable on October 8th were "marked off" the calendar by Justice David Ross, on December 15, 1969, at the behest of Assistant District Attorney Greenfield, who remarked, in substance, that the motions were academic until such time as Justice Marks decided petitioner's motion to withdraw his plea of guilty (74a-5a).

Sentence was imposed upon the petitioner by Justice Abraham J. Gellinoff on January 9, 1970 (21a-37a). At that time, defense attorney Aronstein stated the following:

> "Now it is true, I made a motion before Judge Marks to withdraw the plea, and that motion was denied. No order has been entered, as far as I know, and I don't really recall whether the Court at that time in denying the motion, stated that this was the decision and order of the Court. I don't recall whether he said that. However, I've never been served with any copy of any order, or decision, with notice of entry" (24a).

Next, the defense lawyer referred to his motions to suppress and for inspection of the grand jury minutes in connection with an unsuccessful request for another adjournment (24a-6a). As for the suppression motion, Justice Gellinoff pointed out that an earlier motion for the same relief had been pending at the time the petitioner had pleaded guilty, and he added that the taking of the plea had rendered all the motions academic (26a-8a).

Thereafter, Executive Assistant District Attorney Rotker recommended a maximum sentence on the basis of the petitioner's criminal record—including his 1951 conviction and life sentence for the murder of a police officer; his criminal activities after his release on parole; his alleged extensive links with organized crime; and his apparent wealth, the source of which was not apparent (32a-4a). Counsel for the defense then stated the following:

> "Mr. Aronstein: Mr. Fruchtman, the lawyer who was present, and was this defendant's attorney, at the time of the plea, told me, and told me that he will testify under oath, that at the time he took the plea, Mr. Greenfield, the Assistant District Attorney told him that the District Attorney will not make any recommendations, with respect to the sentence. And I therefore, ask that at this time this Court adjourn this sentence for a short period of time. I'll produce Mr. Fruchtman, and—in court, and have him testify in open court, as to what—
>
> "Now if what Mr. Fruchtman says is true, then the plea was obtained by fraud and deception, by the District Attorney, if it was obtained on the expressed promise that the District Attorney would make no recommendation" (34a).

At that juncture, Mr. Rotker remarked, in essence, that there was no proof of such an occurrence (34a). There followed a brief interlocution between opposing counsel about the absence from the plea minutes of any indication of a sentence promise, which discussion was terminated by the judge (34a-5a).

Next, Justice Gellinoff remarked that there was no need to adjourn the sentence or have any testimony because he

would not be influenced by what the District Attorney said (35a). The presiding jurist then quoted from the defendant's probation report as follows:

> " 'He is unamenable to supervision in the community. He is a professional criminal * * * and a recidivist. Institutionalization * * * is the only means of halting his anti-social activities' " (35a-6a).

The one-year maximum sentence was then imposed (36a).

On January 15, 1970, the petitioner obtained a certificate of reasonable doubt and was admitted to bail (38a-9a). Santobello's claim that he had been promised taciturnity on the prosecution's part at the time of sentence by Mr. Greenfield was conceded to be accurate by the prosecution in the State appellate courts, wherein the propriety of Justice Gellinoff's action *vis-a-vis* petitioner's due process rights was argued. The conviction was unanimously affirmed by the Supreme Court of the State of New York, Appellate Division, First Department [35 A. D. 2d 1084 (40a-1a)], and leave to appeal to the New York Court of Appeals was denied by Burke, J., on February 4, 1971 (41a-2a). On February 16, 1971, Mr. Justice Harlan granted bail to the petitioner pending the disposition of the instant petition. Petitioner did not thereafter move to amend the remittitur so that it would be clear that the New York Courts had passed upon a federal question. As to that, the parties herein have treated the case as one which could not be resolved in the State courts on procedural grounds or upon an independent state ground, and, as has been indicated, arguments in the briefs and orally in the Appellate Division addressed themselves to a claimed deprivation of Santobello's due process rights.

Summary of Argument

As petitioner would have it, this is a rather simple case where his right to relief is clear-cut. Thus, he concludes, this Court should vacate his conviction because the prosecution failed literally to comply with a promise to remain silent at the time of sentence, urging instead that he be given the maximum term which the judge thereafter did impose. Analysis of the record, however, will disclose that a viable "sentence agreement" never existed, for the petitioner simply was not induced to plead guilty because of the pertinent prosecutorial representation. Even if such a viable compact is assumed to have existed, the record would further establish that the petitioner received the functional equivalent of his bargain because the possible breach was called to the attention of the sentencing judge in a timely fashion. Utilization of the "functional equivalency approach" to redress defendants for such wrongs is fully approbated by the cases, the usual forms of relief being the granting of permission to withdraw the plea of guilty or the modifying of the sentence to conform with the terms of the agreement. Here, for cogent and persuasive reasons, the sentencing judge imposed a sentence thought appropriate by him, viewing the courses of action just mentioned as inapt. In so doing, that jurist did not violate the declarations of this Court, or any other persuasive and binding authority, concerning the standards of conduct and of fairness required of prosecutors or concerning a defendant's due process rights attendant upon his entering of a guilty plea.

Argument

Prefatorily, we wish to observe that the question involved herein is hardly as shallow as petitioner would have it, by urging, in essence, that a broken sentence promise requires that the defendant be returned to the *status quo ante* in every case. The opinions of this Court as least insofar as we have been able to discover, have not gone that far or even dealt with a factual context truly analogous to the instant situation. Needless to say, there can be no legal or moral quarrel with this tribunal's oft-declared insistence upon adherence to due process norms in connection with the whole process of accepting a plea from a defendant in a criminal case. The concession in the appellate courts of New York State—that a promise to remain taciturn at the time of sentence was made to the petitioner by an assistant district attorney—reflects an effort to meet the prosecutorial obligation of fairness. Consistently, a belief that there exists a *per se* rule vitiating, without regard to any other attendant circumstances, pleas taken in violation of a prosecutorial promise would have impelled the respondent to refrain from arguing in the State courts that the petitioner's conviction could be upheld without doing violence to contemporary notions of due process—a contention approbated by those tribunals. In our opinion, the State determination herein is not undermined by any persuasive precedent in our nation. True, the record is somewhat sparce, in the absence of an evidentiary hearing, for demonstrating such things as what reliance the petitioner actually placed on the promise. Yet, we believe that the record is sufficient to obviate the need

to remit the matter for an evidentiary hearing, particularly since there is no dispute as to the making of the promise. For our part, we now intend to argue on the basis of the petitioner's own actions as disclosed by the record. Additionally, an inference will be drawn to the effect that Santobello must have appreciated that, in view of his criminal record, he could hardly have escaped incarceration under any circumstances. While the record contains ample justification for that inference, the probation report will, we believe, leave no doubt. Hence, we have requested this Court, by formal motion, to consider that document.

Having made our preliminary observations, we turn now to a demonstration that there was no viable "sentence agreement" here and that, even assuming that there had been such a pact, it may be viewed as having been substantially honored, making the breach of agreement moot.

To begin with, the record may fairly be said to depict the petitioner Santobello as a courtroom-wise recidivist with a single purpose in this litigation, to wit, to avoid serving any time in prison. Sundry factors prompt the characterization aforesaid.

For example, the record indicates that, prior to this case, the petitioner was convicted of murder, and that the probation department, as the sentencing judge stated, found him "* * * unamenable to supervision in the community," and to be a "professional criminal," with the result that institutionaliation was recommended (35a-6a). While we have no knowledge respecting the balance of the probation report, so strong a recommendation suggests that Santobello must have known, before pleading,

that he had little, if any, chance of avoiding incarceration in the event of a conviction herein and that the granting of permission to plead guilty to a lesser charge was a substantial benefit to him.

Relevant, moreover, is the consideration that the petitioner did not claim innocence at the time of the proceedings at the trial court stage, a circumstance he seeks to preclude consideration of at this time by a belated assertion that he is not "legally guilty" (brief, p. 13). Indeed, no claim of innocence has been voiced by the petitioner, himself, at any stage of the proceedings, even in his efforts to withdraw the plea of guilty. Had Santobello advanced such a contention, his utterance alone seemingly would have required the presiding justice either to permit withdrawal of the plea or to conduct a hearing as to the merits of the pertinent claim [see *People* v. *McKennion*, 27 N.Y. 2d 671, 261 N.E. 2d 910 (1970)], albeit the *McKennion* rule was modified by the New York Court of Appeals after *certiorari* was granted herein [see *People* v. *Dixon*, 29 N.Y. 2d 55, —— N.E. 2d —— (1971)]. Incidentally in that regard, New York statutory law, both at the time now relevant [Code Crim. Proc., §337] and today [Crim. Proc. Law, §220.60, subd. 4] authorized the withdrawal of guilty pleas prior to the imposition of sentence as a matter of judicial discretion, and denials of requests to withdraw such pleas have traditionally been treated by the State appellate courts in terms of whether or not there had been abuses of such discretion [see, *e.g.*, *People* v. *Dixon*, *supra*].

Thus far, then, we have seen that a basis exists reasonably to infer that, when negotiating for a plea in this case, the petitioner Santobello knew that his chances of staying

out of prison were slim and "* * * that judges, not prosecutors, control sentences" [*Machibroda v. United States*, dissenting opinion, Clark, J., 368 U.S. 487, 499, 82 S.Ct. 510, 516 (1962)]. While the petitioner succeeded in obtaining a promise from one assistant district attorney that the prosecution would remain silent at his sentencing rather than ask for the imposition of a jail term, certain of his affirmative actions, as distinguished from his failure to claim innocence, virtually impel the conclusion that the said petitioner placed no reliance upon the efficacy of the relevant representation as a mechanism insuring avoidance of incarceration—the sole objective of Santobello.

Illustrative is the timing of his guilty plea and the first motion to suppress evidence on the ground that evidence was illegally seized from him. Interestingly, that motion was made returnable when Justice Marks happened to be in the Bronx County motion part some two months after Santobello's supporting affidavit had been executed, and the defense withdrew that motion in open court before Justice Marks at a point in time following that jurist's acceptance of a plea of guilty from the petitioner (43a-7a, 53a-6a). Thus, it seems to be an inescapable conclusion that the petitioner Santobello opted to plead before the justice he viewed as most likely to be sympathetic to his efforts to avoid imprisonment, gambling on that evaluation to the extent of abandoning his claim of deprivation of constitutional rights. Indeed, he pressed for immediate imposition of sentence following abandonment of the suppression motion, but the jurist in question could not proceed at that time because he did not have the necessary "papers" (56a).

Furthermore, on the next occasion when proceedings were had herein, Justice Marks, on his own initiative from what appears, granted the petitioner a one-week adjournment "[i]n view of the Probation Report * * *" (58a). Thus, Santobello was forewarned that his history of conflict with the law and other relevant considerations precluded sentence being suspended even by a jurist he had thought likely to be sympathetic towards him. Faced with that possibility, however, the petitioner did not rely upon the prosecutorial assurance of taciturnity at the time of sentence as being potentially effective to achieve what he viewed as the *summum bonum*. Instead, he sought, before Justice Marks, on the adjourned date, to withdraw his plea of guilty and to litigate certain legal questions pertaining to his indictment (59a-62a).

The motion to withdraw the plea (5a-10a) is noteworthy respecting the petitioner's state of mind for several reasons. For one thing, there was no reference in Santobello's supporting affidavit to the prosecution's posture on the sentencing question despite the presaged view of Justice Marks. Moreover, that affidavit, which has been missing from the files of the Bronx County Supreme Court at least since January, 1970, may be viewed as being *prima facie* perjurious because of the petitioner's assertion therein that he had not known about his right to move to suppress evidence prior to taking the plea, when the fact was that he had earlier sought such relief by means of a motion supported by his own affidavit sworn to some two months prior to entry of the guilty plea. Such was the extent to which the petitioner was apparently willing to go in order to escape confinement. Indeed, if it had not been for Justice Marks' ruling that the hearing requested by the prosecu-

tion in connection with the motion under discussion was not necessary, it is conceivable that petitioner might have been indicted for perjury— a statement further assuming that the original affidavit filed in the pertinent court would have been available as evidence.

Additionally, one of the two motions which Santobello wished to be considered in the event that his application to withdraw the guilty plea was granted also sheds light on the petitioner's mental processes. We refer to the second motion to suppress evidence (11a-3a) which is substantially identical with the first motion for the same relief abandoned by Santobello (43a-7a). That is to say, the good faith of the latter application is questionable under the circumstances, and reiteration of that contention may properly be labelled as a further delaying tactic. Incidentally, the later suppression application was "marked off" the calendar due to an assistant district attorney's assumption that no determination could be had thereon until Justice Marks had ruled upon the motion to withdraw the guilty plea, (74a-5a)—a ruling already rendered unknown to the prosecutor, conceivably because defense counsel had failed to file an appropriate order as directed by Justice Marks (compare 73a with 24a). Also that defense attorney sought unsuccessfully to revive the second suppression motion at sentence by voicing a misplaced reliance upon an opinion by this tribunal [cf. *Kaufman* v. *United States,* 394 U.S. 217, 89 S.Ct. 1068 (1968)], but the determination thereon was not challenged in the State appellate courts, nor in any complaint now levelled. Similarly, the ruling on the remaining motion (*i.e.,* to inspect the grand jury minutes or, in the alternative, to dismiss the indictment) was not challenged thereafter.

When the petitioner appeared before Justice Gellinoff for sentence, there was no pending motion to withdraw the guilty plea, albeit defense counsel seemed to be somewhat confused on that subject while bending every effort to postpone the sentence (24a). Be that as it may, the presiding jurist simply ruled, in substance, that the plea of guilty by the petitioner had rendered the two remaining motions academic (22a-8a). Thus did the petitioner lose one round in his battle to avoid imprisonment.

Tangentially, certain additional observations may be injected at this point. After Executive Assistant District Attorney Rotker had urged incarceration of Santobello, no formal motion to withdraw the plea of guilty was made, although we concede for present purposes, as we did in the State appellate courts, that the plaint uttered by defense counsel about the broken sentence promise amounted to the same thing. At the time that complaint was voiced, Mr. Rotker remarked, in substance, that there was no evidence of such a promise having been made (34a). While that comment might arguably suggest that Mr. Rotker was unaware of his associate, Mr. Greenfield's, action, the fact of the matter can not be demonstrated on this record. But if our interpretation of the law advanced herein is sound, proof on that subject would not appear to be critical. Suffice it to say for present purposes that the sentencing judge—apparently sensing no legal need for resolution of the pertinent issue—acted so swiftly at the time now pertinent that Mr. Rotker was not given an opportunity to pursue the issue he had raised. Of course, time permitted exploration of the "promise" issue when it was raised on appeal, hence the relevant concession by the prosecution.

Getting back to the sentencing proceeding, in order to make another point, Justice Gellinoff stated, in substance, that the district attorney's actions would not have influenced him in any way and that the probation report left him with no practical alternative other than to incarcerate the petitioner (35a). In our view, that decision, assuming the existence of a viable "sentence agreement," did not infringe upon Santobello's due process rights, making the prosecutor's conduct innocuous.

We have already noted this tribunal's insistence upon fundamental fairness in taking pleas from criminal defendants. But, this Court's pronouncement that a guilty plea must be voluntarily and knowingly made in order, *inter alia,* to protect a person whose conduct does not fall within the charge from pleading thereto [see, *e.g., McCarthy* v. *United States,* 394 U.S. 459, 467, 89 S.Ct. 1166, 1171 (1969)], is not undermined simply because a prosecutor and a judge permit a defendant "* * * to plead guilty to a lesser offense included in the offense charged * * *" [*Brady* v. *United States,* 397 U.S. 742, 90 S.Ct. 1463, 1470 (1970)]. Here, no question as to the petitioner's guilt has been raised in a proper or timely fashion [see *North Carolina* v. *Alford,* 400 U.S. 25, 91 S.Ct. 160 (1970)]. Moreover, the instant record will not support, and the petitioner Santobello does not level (*cf.,* petitioner's brief, pp. 9, 11-12), an allegation that prosecutorial or judicial powers respecting charging and sentencing, respectively, were employed to induce the plea of guilty by the petitioner. Put another way, we do not have, on this record, a situation analogous to the type of over-reaching referred to by this Court in footnote 8 of the *Brady* opinion.

Needless to say, a sentence promise by a prosecutor may be broken for reasons other than actual impropriety on the part of such an official, for example, a breach might conceivably occur as a result of a simple lack of communication between prosecutors in a large office. Beyond question, of course, such wrongs must be righted when the facts come to light. As we read the cases, the mandate for rectification is predicated upon notions of substantial fairness and must be carried out without regard to the circumstances occasioning the breach of agreement. The authorities, again as we interpret them, insist that defendants circumstanced like the petitioner herein be given relief by the courts which might be termed the "functional equivalent" of what they had been promised by the prosecutors, and ordinarily that relief appears to take the form of either granting permission to withdraw the plea of guilty or modifying the sentence to accord with the term of years which the prosecutors had promised they would recommend [see *Machibroda* v. *United States, supra; White* v. *Gaffney,* 435 F. 2d 1241 (10th Cir., 1970); *McCarthy* v. *United States,* 433 F. 2d 591 (1st Cir., 1970); *Kearns* v. *Field,* 432 F. 2d 68 (9th Cir., 1970); *Grant* v. *United States,* 424 F. 2d 273 (5th Cir., 1970); *Byes* v. *United States,* 402 F. 2d 492 (8th Cir., 1968), *cert. den.* 393 U.S. 1121, 89 S.Ct. 999 (1968); *United States* v. *DelPiano,* 386 F. 2d 436 (3d Cir., 1967), *cert. den.* 392 U.S. 36, 88 S.Ct. 2306 (1967); *Scott* v. *United States,* 349 F. 2d 641 (6th Cir., 1965); *Vanater* v. *Boles,* 377 F. 2d 898 (4th Cir., 1967); *Holt* v. *United States,* 329 F. 2d 368 (7th Cir., 1964); *United States* v. *Lester,* 247 F. 2d 496 (2d Cir., 1957); *Howard* v. *State,* 280 Ala. 430, 194 So. 2d 834 (1967); *Cross* v. *State,* Ark., 452 S.W. 2d 854 (1970); *People* v. *Delles,* 69 Cal. 2d 906, 447 P. 2d 629 (1968); *Roberts* v.

People, 158 Col. 76, 404 P. 2d 848 (1965); *Brown* v. *State,* Fla., 245 So. 2d 41 (1971); *People* v. *Mitchell,* 46 Il. 2d 133, 262 N.E. 2d 915 (1970); *State* v. *Lindsey,* Iowa, 171 N.W. 2d 859 (1969); *Schwerm* v. *State,* Minn., 181 N.W. 2d 867 (1970); *State* v. *Roach,* Mo., 447 S.W. 2d 553 (1969); *State* v. *Journey,* 186 Neb. 556, 184 N.W. 2d 616 (1971); *People* v. *Bagley,* 23 N.Y. 2d 814, 244 N.E. 2d 880 (1969); *People* v. *DeWolfe,* 36 A.D. 2d 618, 318 N.Y. Supp. 2d 810 (2d Dept. 1971); *People* v. *Hernandez,* 29 A.D. 2d 865, 289 N.Y. Supp. 2d 394 (2d Dept. 1968); *People* v. *Brooks,* 18 A.D. 2d 710, 236 N.Y. Supp. 2d 228 (2d Dept. 1962); *Jones* v. *State,* Okla., 477 P. 2d 85 (Ct. of Crim. Appeals 1970); *Commonwealth* v. *Alvarado,* Pa., 276 A. 2d 526 (1971); *Bailey* v. *MacDougall,* 247 S.C. 1, 145 S.E. 2d 425 (1965); *Garrison* v. *Rhay,* 75 Wash. 2d 98, 449 P. 2d 92 (1968); *State ex rel. Clancy* v. *Coiner,* W. Va., 179 S.E. 2d 726 (1971); *Kruse* v. *State,* 47 Wis. 2d 460, 177 N.W. 2d 322 (1970)].

In our view, the petitioner Santobello received "functional equivalency" relief. Before developing that theme, we wish to pause for a discussion of an even more fundamental consideration, to wit, whether a representation by a prosecutor that he will remain silent at the sentencing of a defendant is in reality a "sentence promise." First of all, we have found no authority on the subject. Moreover, we doubt, and this record utterly fails to demonstrate, that sentencing judges are necessarily influenced by either a prosecutor's silence or his request for incarceration of a defendant. As a matter of fact, Justice Gellinoff represented that neither course of action would have swayed him, his only criterion for imposing sentence being the

probation report (35a). As we have seen, Santobello's earlier exposure to the courts positioned him to know that only judges control sentences. Under such circumstances, the petitioner simply entertained what the cases characterize as an unwarranted expectation of leniency which, when it fails to materialize, is not enforceable by judicial action [see *Holt* v. *United States, supra; State* v. *Zarate,* Ariz., 478 P. 2d 74 (1970); *State* v. *Helter,* Iowa, 179 N.W. 2d 371 (1970); *Schwerm* v. *State, supra; Mathis* v. *Warden,* Nev., 471 P. 2d 233 (1970); *Johnson* v. *State,* 49 Wis. 2d 455, 182 N.W. 2d 502 (1971)]. As a consequence, the prosecutor's action herein might reasonably be declared to be somewhat akin to innocuous error at trial and the judgment affirmed on that basis [see *Chapman* v. *California,* 386 U.S. 18, 24, 87 S.Ct. 1283 (1967)].

Such an approach, we acknowledge, would negate the imposition of any sanction for the conduct of the prosecutor's office. However, this Court perhaps might feel that any breach of the relevant type agreement, however inadvertent and however unrealistic the defendant's related hope, must be judicially redressed because of the high levels of conduct and of fairness to which prosecutors are properly held. Even if such is the case, we would submit that the judgment could still be affirmed on the ground that the petitioner Santobello received the functional equivalent of an honored sentence promise.

Obviously, we base that contention primarily upon the averments of Justice Gellinoff (35a). Before that jurist voiced those remarks, he was aware of three critical factors —*viz.*, (1) that the probation report, in rather strong language, recommended incarceration of the petitioner; (2)

that the prosecutor's request for Santobello's imprisonment might have been voiced in violation of another prosecutor's promise to remain silent on the subject of sentence; and (3) that no claim of innocence was then being made by the petitioner. Yet, possessed of legal power to permit withdrawal of the plea or to take evidence on the relevant claim, Justice Gellinoff announced that he would not have been influenced by any conduct of the prosecutor, and certainly there is no reason for not now taking that averment at face value. Nor is there any reason to believe that the jurist in question did not, or in so short a time was unable to, evaluate the fact that a prosecutorial promise to the petitioner had been dishonored. Additionally, the imposition of the prison term is unassailable in view of the probation report. In sum, then, all relevant factors were weighed by Justice Gellinoff, and the manner in which he exercised his discretion may not be termed abusive.

In urging the foregoing argument, we have not been unmindful of the single precedent in the area which, while seemingly rejecting our contention, will be deemed factually distinguishable upon close analysis, at least in our opinion [see *White* v. *Gaffney*, 435 F. 2d 1241 (10th Cir. 1970)].

In *White*, a county attorney failed to live up to a promise to recommend to the court that the sentence imposed upon the defendant should be for a long term of years, rather than life imprisonment, which latter type of sentence barred the possibility of parole under Kansas law. Immediately after sentencing, the matter was called to the judge's attention, and proceedings were held on a motion

to withdraw the plea the following day. In refusing to permit withdrawal of the plea, the jurist in question pointed out that he had not been a party to the agreement; that if the recommendation had been made as agreed, the sentence would have been identical; and that the county attorney had made the recommendation at the time of the motion for permission to withdraw the guilty plea. The Kansas courts affirmed the conviction, essentially on the "functional equivalency" ground that we have advanced herein. However, the Tenth Circuit reversed the judgment, expressing the opinion that the State courts had improperly concluded that the question for resolution was the effectiveness of the promise. As the pertinent Federal Court evaluated the situation, the State courts had overlooked the essential constitutional defect in the plea by simply assuming that the defendant would have entered the same plea had he been aware that there would be no recommendation. Moreover, on the basis of an evidentiary hearing, the Tenth Circuit, after noting that the sentencing judge therein generally followed the county attorney's recommendations, concluded that the defendant White would not have entered the guilty plea but for the prosecutorial promise.

Manifestly, then, the *White* court and the argument advanced by us hereinabove are at odds respecting the proper focal point in a case such as the instant one. For our part, we adhere to the view that, as long as the promise is communicated to, and considered by, the sentencing judge, the defendant has received all for which he had bargained. To reject that contention seemingly would be tantamount to imposing a pervasive sanction upon prose-

cutors for even such lapses as dilatoriness. Certainly, a defendant's disappointment respecting the sentence imposed upon him does not have to be assuaged for such slight cause. Additionally, while it should have no significance *vis a vis* constitutional rights, the fact that White faced a lifetime of imprisonment without hope of parole might conceivably have had an effect upon the decision of the Tenth Circuit.

However, there is, as stated earlier, an aspect of this case which not only differentiates it from *White,* making resolution of the conflicting views just discussed unnecessary, but which also constitutes an independent ground for affirmance of the judgment. For the record establishes that the petitioner Santobello did not plead guilty in reliance upon the prosecutor's promise, but rather because he decided to take his chances on receiving a suspended sentence from a particular judge—a strategem which simply backfired.

The factors upon which we are relying in support of this contention have already been discussed. They include, to begin with, the petitioner's knowledge of the way in which courts function, and his appreciation that, even if the prosecution remained silent at sentence, he had little chance of escaping incarceration, given his background and the minimal sentencing range to which he would be exposed after being permitted to plead to a reduced charge. Also relevant are such things as the timing of the plea of guilty and the first motion to suppress, which application was abandoned after the plea was entered; the absence of a timely assertion of innocence; and the efforts made to

withdraw the plea and to renew the abandoned suppression motion when the prospective action of Justice Marks was augured, a time when Santobello had no reason to believe that the pertinent agreement would be broken. On the strength of these factors, the conclusion is unavoidable that Santobello was not induced to plead guilty by the prosecution's representation and, consequently, that there was no viable "sentence agreement" attendant upon the entry of the plea of guilty.

Conclusion

The judgment of conviction should be affirmed.

Respectfully submitted,

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September 23, 1971

SANTOBELLO *v.* NEW YORK

CERTIORARI TO APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

No. 70–98. Argued November 15, 1971—Decided December 20, 1971

After negotiations with the prosecutor, petitioner withdrew his previous not-guilty plea to two felony counts and pleaded guilty to a lesser-included offense, the prosecutor having agreed to make no recommendation as to sentence. At petitioner's appearance for sentencing many months later a new prosecutor recommended the maximum sentence which the judge (who stated that he was uninfluenced by that recommendation) imposed. Petitioner attempted unsuccessfully to withdraw his guilty plea, and his conviction was affirmed on appeal. *Held:* The interests of justice and proper recognition of the prosecution's duties in relation to promises made in connection with "plea bargaining" require that the judgment be vacated and that the case be remanded to the state courts for further consideration as to whether the circumstances require only that there be specific performance of the agreement on the plea (in which case petitioner should be resentenced by a different judge), or petitioner should be afforded the relief he seeks of withdrawing his guilty plea. Pp. 260–263.

35 App. Div. 2d 1084, 316 N. Y. S. 2d 194, vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which DOUGLAS, WHITE, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a concurring opinion, *post*, p. 263. MARSHALL, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and STEWART, JJ., joined, *post*, p. 267.

Irving Anolik argued the cause and filed a brief for petitioner.

Daniel J. Sullivan argued the cause for respondent. With him on the brief was *Burton B. Roberts.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to determine whether the State's failure to keep a commitment concerning

the sentence recommendation on a guilty plea required a new trial.

The facts are not in dispute. The State of New York indicted petitioner in 1969 on two felony counts, Promoting Gambling in the First Degree, and Possession of Gambling Records in the First Degree, N. Y. Penal Law §§ 225.10, 225.20. Petitioner first entered a plea of not guilty to both counts. After negotiations, the Assistant District Attorney in charge of the case agreed to permit petitioner to plead guilty to a lesser-included offense, Possession of Gambling Records in the Second Degree, N. Y. Penal Law § 225.15, conviction of which would carry a maximum prison sentence of one year. The prosecutor agreed to make no recommendation as to the sentence.

On June 16, 1969, petitioner accordingly withdrew his plea of not guilty and entered a plea of guilty to the lesser charge. Petitioner represented to the sentencing judge that the plea was voluntary and that the facts of the case, as described by the Assistant District Attorney, were true. The court accepted the plea and set a date for sentencing. A series of delays followed, owing primarily to the absence of a pre-sentence report, so that by September 23, 1969, petitioner had still not been sentenced. By that date petitioner acquired new defense counsel.

Petitioner's new counsel moved immediately to withdraw the guilty plea. In an accompanying affidavit, petitioner alleged that he did not know at the time of his plea that crucial evidence against him had been obtained as a result of an illegal search. The accuracy of this affidavit is subject to challenge since petitioner had filed and withdrawn a motion to suppress, before pleading guilty. In addition to his motion to withdraw his guilty plea, petitioner renewed the motion to suppress and filed a motion to inspect the grand jury minutes.

These three motions in turn caused further delay until November 26, 1969, when the court denied all three and set January 9, 1970, as the date for sentencing. On January 9 petitioner appeared before a different judge, the judge who had presided over the case to this juncture having retired. Petitioner renewed his motions, and the court again rejected them. The court then turned to consideration of the sentence.

At this appearance, another prosecutor had replaced the prosecutor who had negotiated the plea. The new prosecutor recommended the maximum one-year sentence. In making this recommendation, he cited petitioner's criminal record and alleged links with organized crime. Defense counsel immediately objected on the ground that the State had promised petitioner before the plea was entered that there would be no sentence recommendation by the prosecution. He sought to adjourn the sentence hearing in order to have time to prepare proof of the first prosecutor's promise. The second prosecutor, apparently ignorant of his colleague's commitment, argued that there was nothing in the record to support petitioner's claim of a promise, but the State, in subsequent proceedings, has not contested that such a promise was made.

The sentencing judge ended discussion, with the following statement, quoting extensively from the presentence report:

> "Mr. Aronstein [Defense Counsel], I am not at all influenced by what the District Attorney says, so that there is no need to adjourn the sentence, and there is no need to have any testimony. It doesn't make a particle of difference what the District Attorney says he will do, or what he doesn't do.
>
> "I have here, Mr. Aronstein, a probation report. I have here a history of a long, long serious criminal record. I have here a picture of the life history of this man. . . .

> "'He is unamenable to supervision in the community. He is a professional criminal.' This is in quotes. 'And a recidivist. Institutionalization—'; that means, in plain language, just putting him away, 'is the only means of halting his anti-social activities,' and protecting you, your family, me, my family, protecting society. 'Institutionalization.' Plain language, put him behind bars.
>
> "Under the plea, I can only send him to the New York City Correctional Institution for men for one year, which I am hereby doing."

The judge then imposed the maximum sentence of one year.

Petitioner sought and obtained a certificate of reasonable doubt and was admitted to bail pending an appeal. The Supreme Court of the State of New York, Appellate Division, First Department, unanimously affirmed petitioner's conviction, 35 App. Div. 2d 1084, 316 N. Y. S. 2d 194 (1970), and petitioner was denied leave to appeal to the New York Court of Appeals. Petitioner then sought certiorari in this Court. Mr. Justice Harlan granted bail pending our disposition of the case.

This record represents another example of an unfortunate lapse in orderly prosecutorial procedures, in part, no doubt, because of the enormous increase in the workload of the often understaffed prosecutor's offices. The heavy workload may well explain these episodes, but it does not excuse them. The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned. See *Brady* v. *United States*, 397 U. S. 742, 751–752 (1970).

However, all of these considerations presuppose fairness in securing agreement between an accused and a prosecutor. It is now clear, for example, that the accused pleading guilty must be counseled absent a waiver. *Moore* v. *Michigan*, 355 U. S. 155 (1957). Fed. Rule Crim. Proc. 11, governing pleas in federal courts, now makes clear that the sentencing judge must develop, *on the record*, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge.[1] The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must

[1] Fed. Rule Crim. Proc. 11 provides:

"A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

in some way be made known. There is, of course, no absolute right to have a guilty plea accepted. *Lynch* v. *Overholser,* 369 U. S. 705, 719 (1962); Fed. Rule Crim. Proc. 11. A court may reject a plea in exercise of sound judicial discretion.

This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

On this record, petitioner "bargained" and negotiated for a particular plea in order to secure dismissal of more serious charges, but also on condition that no sentence recommendation would be made by the prosecutor. It is now conceded that the promise to abstain from a recommendation was made, and at this stage the prosecution is not in a good position to argue that its inadvertent breach of agreement is immaterial. The staff lawyers in a prosecutor's office have the burden of "letting the left hand know what the right hand is doing" or has done. That the breach of agreement was inadvertent does not lessen its impact.

We need not reach the question whether the sentencing judge would or would not have been influenced had he known all the details of the negotiations for the plea. He stated that the prosecutor's recommendation did not influence him and we have no reason to doubt that. Nevertheless, we conclude that the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case

to the state courts for further consideration. The ultimate relief to which petitioner is entitled we leave to the discretion of the state court which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, in which case petitioner should be resentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner, *i. e.*, the opportunity to withdraw his plea of guilty.[2] We emphasize that this is in no sense to question the fairness of the sentencing judge; the fault here rests on the prosecutor, not on the sentencing judge.

The judgment is vacated and the case is remanded for reconsideration not inconsistent with this opinion.

MR. JUSTICE DOUGLAS, concurring.

I join the opinion of the Court and add only a word. I agree both with THE CHIEF JUSTICE and with MR. JUSTICE MARSHALL that New York did not keep its "plea bargain" with petitioner and that it is no excuse for the default merely because a member of the prosecutor's staff who was not a party to the "plea bargain" was in charge of the case when it came before the New York court. The staff of the prosecution is a unit and each member must be presumed to know the commitments made by any other member. If responsibility could be evaded that way, the prosecution would have designed another deceptive "contrivance," akin to those we condemned in *Mooney* v. *Holohan*, 294 U. S. 103, 112, and *Napue* v. *Illinois*, 360 U. S. 264.

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[2] If the state court decides to allow withdrawal of the plea, the petitioner will, of course, plead anew to the original charge on two felony counts.

These "plea bargains" are important in the administration of justice both at the state [1] and at the federal [2] levels and, as THE CHIEF JUSTICE says, they serve an important role in the disposition of today's heavy calendars.

However important plea bargaining may be in the administration of criminal justice, our opinions have established that a guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver of the fundamental rights to a jury trial, *Duncan* v. *Louisiana*, 391 U. S. 145, to confront one's accusers, *Pointer* v. *Texas*, 380 U. S. 400, to present witnesses in one's defense, *Washington* v. *Texas*, 388 U. S. 14, to remain silent, *Malloy* v. *Hogan*, 378 U. S. 1, and to be convicted of proof beyond all reasonable doubt, *In re Winship*, 397 U. S. 358. Since *Kercheval* v. *United States*, 274 U. S. 220, this Court has recognized that "unfairly obtained" guilty pleas in the federal courts ought to be vacated. In the course of holding that withdrawn guilty pleas were not admissible in subsequent federal prosecutions, the Court opined:

> "[O]n timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence. Such an application does not involve any question of guilt or innocence." *Id.*, at 224.

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[1] In 1964, guilty pleas accounted for 95.5% of all criminal convictions in trial courts of general jurisdiction in New York. In 1965, the figure for California was 74.0%. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 9 (1967).

[2] In 1964, guilty pleas accounted for 90.2% of all criminal convictions in United States district courts. *Ibid.* In fiscal 1970, of 28,178 convictions in the 89 United States district courts, 24,111 were by pleas of guilty or *nolo contendere*. Report of Director of Administrative Office of U. S. Courts, for Period July 1 through Dec. 31, 1970, Table D–4, p. A–26.

Although *Kercheval's* dictum concerning grounds for withdrawal of guilty pleas did not expressly rest on constitutional grounds (cf. *Frame* v. *Hudspeth*, 309 U. S. 632), *Walker* v. *Johnston*, 312 U. S. 275, clearly held that a federal prisoner who had pleaded guilty despite his ignorance of and his being uninformed of his right to a lawyer was deprived of that Sixth Amendment right, or if he had been tricked by the prosecutor through misrepresentations into pleading guilty then his due process rights were offended. In *Walker*, the petitioner was granted an evidentiary hearing to prove his factual claims in anticipation of vacating the plea. Accord: *Waley* v. *Johnston*, 316 U. S. 101; *Von Moltke* v. *Gillies*, 332 U. S. 708. In *Machibroda* v. *United States*, 368 U. S. 487, the defendant alleged that when he threatened to tell his lawyer of private promises made by an Assistant United States Attorney in exchange for a proposed guilty plea, the prosecutor threatened additional prosecutions. Although the Government denied them, the Court held that if the allegations were true, then the defendant would be entitled to have his sentence vacated and the matter was remanded for an evidentiary hearing.

State convictions founded upon coerced or unfairly induced guilty pleas have also received increased scrutiny as more fundamental rights have been applied to the States. After *Powell* v. *Alabama*, 287 U. S. 45, the Court held that a state defendant was entitled to a lawyer's assistance in choosing whether to plead guilty. *Williams* v. *Kaiser*, 323 U. S. 471. In *Herman* v. *Claudy*, 350 U. S. 116, federal habeas corpus was held to lie where a lawyerless and uneducated state prisoner had pleaded guilty to numerous and complex robbery charges. And, a guilty plea obtained without the advice of counsel may not be admitted at a subsequent state prosecution. *White* v. *Maryland*, 373 U. S. 59. Thus, while plea bargaining is not *per se* unconstitutional, *North Carolina* v. *Alford*, 400 U. S. 25, 37–38, *Shelton* v. *United States*, 242 F. 2d 101,

aff'd *en banc*, 246 F. 2d 571 (CA5 1957), a guilty plea is rendered voidable by threatening physical harm, *Waley* v. *Johnston, supra,* threatening to use false testimony, *ibid.*, threatening to bring additional prosecutions, *Machibroda* v. *United States, supra,* or by failing to inform a defendant of his right of counsel, *Walker* v. *Johnston, supra.* Under these circumstances it is clear that a guilty plea must be vacated.

But it is also clear that a prosecutor's promise may deprive a guilty plea of the "character of a voluntary act." *Machibroda* v. *United States, supra,* at 493. Cf. *Bram* v. *United States,* 168 U. S. 532, 542–543. The decisions of this Court have not spelled out what sorts of promises by prosecutors tend to be coercive, but in order to assist appellate review in weighing promises in light of all the circumstances, all trial courts are now required to interrogate the defendants who enter guilty pleas so that the waiver of these fundamental rights will affirmatively appear in the record. *McCarthy* v. *United States,* 394 U. S. 459; *Boykin* v. *Alabama,* 395 U. S. 238. The lower courts, however, have uniformly held that a prisoner is entitled to some form of relief when he shows that the prosecutor reneged on his sentencing agreement made in connection with a plea bargain, most jurisdictions preferring vacation of the plea on the ground of "involuntariness," while a few permit only specific enforcement. Note: Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U. Pa. L. Rev. 865, 876 (1964). As one author has stated, the basis for outright vacation is "an outraged sense of fairness" when a prosecutor breaches his promise in connection with sentencing. D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 36 (1966).

This is a state case over which we have no "supervisory" jurisdiction; and Rule 11 of the Federal Rules

of Criminal Procedure obviously has no relevancy to the problem.

I join the opinion of the Court and favor a constitutional rule for this as well as for other pending or oncoming cases. Where the "plea bargain" is not kept by the prosecutor, the sentence must be vacated and the state court will decide in light of the circumstances of each case whether due process requires (a) that there be specific performance of the plea bargain or (b) that the defendant be given the option to go to trial on the original charges. One alternative may do justice in one case, and the other in a different case. In choosing a remedy, however, a court ought to accord a defendant's preference considerable, if not controlling, weight inasmuch as the fundamental rights flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the State.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART join, concurring in part and dissenting in part.

I agree with much of the majority's opinion, but conclude that petitioner must be permitted to withdraw his guilty plea. This is the relief petitioner requested, and, on the facts set out by the majority, it is a form of relief to which he is entitled.

There is no need to belabor the fact that the Constitution guarantees to all criminal defendants the right to a trial by judge or jury, or, put another way, the "right not to plead guilty," *United States* v. *Jackson*, 390 U. S. 570, 581 (1968). This and other federal rights may be waived through a guilty plea, but such waivers are not lightly presumed and, in fact, are viewed with the "utmost solicitude." *Boykin* v. *Alabama*, 395 U. S. 238, 243 (1969). Given this, I believe that where the defendant presents a reason for vacating his plea and the government has not relied on the plea to its disadvantage,

the plea may be vacated and the right to trial regained, at least where the motion to vacate is made prior to sentence and judgment. In other words, in such circumstances I would not deem the earlier plea to have irrevocably waived the defendant's federal constitutional right to a trial.

Here, petitioner never claimed any automatic right to withdraw a guilty plea before sentencing. Rather, he tendered a specific reason why, in his case, the plea should be vacated. His reason was that the prosecutor had broken a promise made in return for the agreement to plead guilty. When a prosecutor breaks the bargain, he undercuts the basis for the waiver of constitutional rights implicit in the plea. This, it seems to me, provides the defendant ample justification for rescinding the plea. Where a promise is "unfulfilled," *Brady* v. *United States*, 397 U. S. 742, 755 (1970), specifically denies that the plea "must stand." Of course, where the prosecutor has broken the plea agreement, it may be appropriate to permit the defendant to enforce the plea bargain. But that is not the remedy sought here.* Rather, it seems to me that a breach of the plea bargain provides ample reason to permit the plea to be vacated.

It is worth noting that in the ordinary case where a motion to vacate is made prior to sentencing, the government has taken no action in reliance on the previously entered guilty plea and would suffer no harm from the plea's withdrawal. More pointedly, here the State claims no such harm beyond disappointed expec-

*JUSTICE DOUGLAS, although joining the Court's opinion (apparently because he thinks the remedy should be chosen by the state court), concludes that the state court "ought to accord a defendant's preference considerable, if not controlling, weight." Thus, a majority of the Court appears to believe that in cases like these, when the defendant seeks to vacate the plea, that relief should generally be granted.

tations about the plea itself. At least where the government itself has broken the plea bargain, this disappointment cannot bar petitioner from withdrawing his guilty plea and reclaiming his right to a trial.

I would remand the case with instructions that the plea be vacated and petitioner given an opportunity to replead to the original charges in the indictment.